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**NATIONAL REMEDIES AVAILABLE FOR BREACH OF EEC LAW**  
**BY PUBLIC AUTHORITIES: A COMPARATIVE STUDY**

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Thesis submitted to the University of Durham for  
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fulfilment of the requirements of the Degree of  
Bachelor of Civil Law.

Michaelmas Term, 1990



25 APR 1991

## ABSTRACT

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B.C.L. Thesis  
Michaelmas Term 1990

### NATIONAL REMEDIES AVAILABLE FOR BREACH OF EEC LAW BY PUBLIC AUTHORITIES: A COMPARATIVE STUDY

This thesis is a comparative study of the remedies which may be sought by individuals when public authorities in England, France or Italy infringe EEC law. It compares the availability of such remedies against the standards set by the European Court of Justice of equality and effectiveness in the protection of rights deriving from EC law.

Chapter 1 discusses the nature of EC law, its direct effect and the duty laid upon national courts to provide adequate and effective protection of EC rights. Through the case law of the European Court the work shows that the infringement of such rights by national authorities entitles individuals to claim restitution of illegally-levied duties, damages for breach of a right and interim relief to prevent further violation.

Chapters 2-4 each provide an outline and discussion of the various domestic remedies which may be sought against the administration in England, France and Italy where it violates EC law, viz. restitution of illegally-levied taxes, interim relief, damages and judicial review. The use of each remedy in protecting EC rights is discussed with reference to the relevant case law of the national courts.

Chapter 5 contains a direct comparative analysis of the provision of such remedies in the three countries through the use of the solutions to several problems based on hypothetical facts. On the basis of these solutions, the provision and effectiveness of the remedies are compared to the standards set by the European Court, with regard to the non-discrimination in the provision of such remedies and their efficacy. Finally, there is a discussion on the possibility of issuing EC-wide harmonising measures as a way of ensuring that certain basic remedies are available against national administrative authorities to all claimants in domestic courts.



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## NOTES

### Note on Translation

For the purposes of the thesis, it has been assumed that the reader has a basic knowledge of the French language. Such an assumption has not been made in respect of the Italian language and consequently English versions have been provided. The articles of the Constitution and Codice civile have been taken from Blaustein & Flanz (eds) *Constitutions of the Countries of the World* Vol. VIII s.v. *Italy* (1987) and Beltramo, Longo & Merryman *The Italian Civil Code* (1969). The quotations from the cases of *Colussi* and *Salgoil* are taken from the *Common Market Law Reports*. The vast majority of the material, however, has been translated by Miss Annette Helena Williams, BA, whose help in this matter I gratefully acknowledge.

### Declaration

None of the material offered has previously been submitted by the author for a degree in this or any other university.

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## ABBREVIATIONS

AC/App Cas	Law Reports, Appeal Cases
A.F.D.I.	Annuaire français de droit international
A.J.D.A.	Actualité juridique, Droit administratif
All ER	All England Law Reports
App.	Corte d'appello
Arch. resp. civ.	Archivio della responsabilità civile
Arr.	arrêté
art/Art	Article
B & Ad	Barnewall and Adolphus' Reports
B & C	Barnewall and Cresswell's Reports
Bing	Bingham's Reports
c	Chapter (of Act of Parliament)
CA	Cour d'appel (France)
Cah. dr. europ.	Cahiers de droit européen
Cass.	Cour de Cassation (France); Corte di Cassazione (Italy)
CC	Code civil (France); Codice civile (Italy)
CD	Code des douanes
CE	Conseil d'Etat
Ch/Ch D	Law Reports, Chancery Division
Cl & Fin	Clark and Finnelly's Reports
CML Rev	Common Market Law Review
Com Cas	Commercial Cases
Cons. Stato.	Consiglio di Stato (court)
Cons. st.	Il Consiglio di Stato (journal)
Corti Bresc.	Le Corti di Brescia, Venezia e Trieste
Ven. Trieste	
CMLR	Common Market Law Reports
CP	Codice penale
CPC	Codice di procedura civile
D.	Recueil Dalloz
Décr.	décret
De G & J	De Gex and Jones' Reports
Denning LJ	Denning Law Journal
Dir	Directive
Dir. e giur.	Diritto e giurisprudenza
Dir. scambi internaz.	Diritto negli scambi internazionali (1962-74)/Diritto comunitario e degli scambi internazionali (1975-date)
D.L.	decreto legge
DLR	Dominion Law Reports
DPC	Decreto del Presidente del Consiglio dei Ministri
DPR	Decreto del Presidente della Repubblica
DVB1	Deutsches Verwaltungsblatt

East	East's Reports
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECSC	European Coal and Steel Community
EEC	European Economic Community
El & Bl	Ellis and Blackburn's Reports
EL Rev	European Law Review
ER	English Reports
EURATOM	European Atomic Energy Community
Ex/Ex D	Law Reports, Exchequer Division
Ford Corp L Inst	Fordham Corporate Law Institute
Foro amm.	Foro amministrativo
Foro it.	Foro italiano
Foro it. Mass.	Massimario del Foro italiano
Foro it. Rep.	Repertorio Generale Annuale del Foro italiano
Foro pad.	Foro padano
Gaz. Pal.	Gazette du Palais
Gaz. Uff.	Gazzetta Ufficiale della Repubblica Italiana
Giur. cost.	Giurisprudenza costituzionale
Giur. it.	Giurisprudenza italiana
Giur. tosc.	Giurisprudenza toscana
Giust. amm.	Giustizia amministrativa
Giust. civ.	Giustizia civile
Giust. civ. Mass.	Giustizia civile Massimario
Giust. civ. Rep.	Giustizia civile Repertorio
H & N	Hurlstone and Norman's Reports
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Court Reports (1972- 1974); Industrial Cases Reports (1975-date)
Int. Ency. Comp. L.	International Encyclopaedia of Comparative Law
J.C.P.	Juris-Classeur périodique (La Semaine juridique)
J.O.R.F.	Journal Officiel de la République Française
KB	Law Reports, King's Bench Division
L.	loi (France); legge (Italy)
L. constit.	loi constitutionnelle
Ld Raym	Lord Raymond's Reports
LGR	Knight's Local Government Reports
LIEI	Legal Issues of European Integration
LJKB	Law Journal, King's Bench
LQR	Law Quarterly Review
LR CP	Law Reports, Common Pleas
LR Exch	Law Reports, Exchequer



LR HL	Law Reports, House of Lords
LT	Law Times Reports
MLR	Modern Law Review
M & W	Meeson & Welsby's Reports
n./no	number
New LJ	New Law Journal
NZLR	New Zealand Law Reports
Ord.	Order (England); ordonnance (France)
PL	Public Law
QB/QBD	Law Reports, Queen's Bench Division
r	rule
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R.D.	Regio decreto
R.D.P.	Revue du droit public et de la science politique en France et à l'étranger
Rec	Recueil des arrêts du Conseil d'Etat (Lebon)
Rec Con constit	Recueil des décisions du Conseil constitutionnel
Reg	Regulation
R.F.D.A.	Revue française de droit administratif
Riv. amm.	Rivista amministrativa della Repubblica italiana
Riv. dir. pubbl.	Rivista di diritto pubblico
Riv. internaz. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. trim. dr. pubbl.	Rivista trimestrale di diritto pubblico
R.M.C.	Revue du Marché Commun
R.T.D.E.	Revue trimestrielle de droit européen
s	section
S.	Recueil Sirey
SLG	Scottish Law Gazette
Sol Jo	Solicitors' Journal
TAR	Tribunale amministrativo regionale
Temi rom.	Temi romana
Term Rep	Term Reports (Durnford and East)
TLR	Times Law Reports
Trib.	Tribunale
TU	Testo unico
WLR	Weekly Law Reports
YEL	Yearbook of European Law

# EUROPEAN COMMUNITIES

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L. 20 novembre 1982, n. 896.	238
L. 27 novembre 1982, n. 873.	236ff
art 19	308
	312
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L. 9 marzo 1989, n. 86	229
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art 60	256
TU 26 giugno 1924, n. 1054.	
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art 36 (modified by L. 8 febbraio 1925, n. 88)	275

TU 15 ottobre 1925, n. 2578.	256
TU 31 gennaio 1926, n. 452.	256
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art 25	256
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 TU 10 gennaio 1957, n. 3.	
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## CHAPTER ONE

### EUROPEAN COMMUNITY LAW AND THE NEED FOR NATIONAL REMEDIES

#### (1) INTRODUCTION

The purpose of this chapter is to examine, through the case law of the European Court of Justice, the nature of the remedies which national courts are required to afford to individuals in order to protect their rights deriving from EC law when they are infringed by the public administration. There will be a brief examination of the nature of Community law and discussion of EEC Art 5 and the doctrine of direct effect. It is intended to show that the combined effect of the supremacy of EC law over national law, the requirement of "Community loyalty" in EEC Art 5 and the finding by the ECJ of a provision to be of direct effect, requires the national courts of Member States, to give adequate and effective protection to EC rights. The present study will centre on those remedies which are of particular assistance to individuals in domestic courts, viz. the reimbursement of taxes illegally levied by national authorities in contravention of EC law, the award of damages or the order for interim injunctive relief for breach of Community rights by public authorities. The use by Member States of judicial review as a means of satisfying the requirement of effectiveness will be considered in the separate chapters on national law.

## (2) NATURE OF EUROPEAN COMMUNITY LAW

European Community law was initially created by the three treaties which established the European Communities - the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community. These international treaties created institutions with separate legal personality under international law and an independent system of law within which those institutions, the Member States and their nationals have rights and duties. The whole Community legal order has been made subject to review and interpretation by the ECJ. Although a separate legal system, Community law is not isolated from other law but stands between national law and international law rather in the way, it has been suggested,<sup>1</sup> that in a federal state, federal law stands between international law and state law.

Despite being based on treaties drawn up in accordance with international law, Community law has increasingly distanced itself from international law. The fundamental reason for this difference lies in the differing objects of the two legal orders: whereas international law relates to the resolution of conflict in laws between States, Community law is designed to promote integration between its Member States. Moreover, it is a more developed legal order than that in international law: one aspect of this greater development is the way in which the EC treaties go further than traditional international treaties and create direct effects by directly conferring rights and imposing obligations on individuals and

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<sup>1</sup> Warner, 'The Relationship between European Community Law and the National Laws of Member States' (1977) 93 LQR at 351.

enterprises within the Member States. This has led the ECJ to conclude that EC law is a new system of rules of such a character as to make it a new legal order, separate and distinct from international law.<sup>2</sup>

Consequently, although engendered by international law, Community law does not share all its characteristics. In fact, it has been stated,<sup>3</sup> many of the techniques and doctrines used in the Community legal order have more in common with branches of national law such as constitutional and administrative law than with those of international law. However, Community law is separate from national law, even though it is applied by national courts. Accordingly,<sup>4</sup> national legislatures do not possess the power to amend or repeal it; in the event of conflict, it is to override national law; and its interpretation comes, in the last resort, within the exclusive jurisdiction of the ECJ. As the ECJ decided in *Van Gend en Loos*,<sup>5</sup> the Member States have limited their sovereignty, within a limited sphere, in favour of the supremacy of the Community legal order and its laws.

The following work will proceed on the basis that Community law is *sui generis* in nature, distinct from, though

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<sup>2</sup> Case 26/62 *N.V. Algemene Transport - en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 at 12. The ECJ referred to the creation of "a new legal order of international law," a term which it dropped in subsequent cases: see Case 6/64 *Costa v. ENEL* [1964] ECR 585. See also Wyatt, 'New Legal Order, or Old?' (1982) 7 EL Rev 147.

<sup>3</sup> Hartley, *The Foundations of European Community Law* 2nd ed. at 85 (1988).

<sup>4</sup> Note 3 *loc. cit.*

<sup>5</sup> [1963] ECR 1 at 12.

closely linked to, both international law and the laws of the various Member States.

### (3) ARTICLE 5 AND PROTECTION OF COMMUNITY RIGHTS

In spite of its *sui generis* nature and supremacy over national laws, Community law remains, to a large extent, dependent for its application, implementation and enforcement on the diverse legal systems of the Member States. Through a variety of national procedures and by means of different institutional arrangements, Community rules are applied in these States. As long as they effectively implement Community policies and decisions, acting as agent for and on behalf of the European Community, the States comply with the obligation of Community loyalty imposed on them by EEC Art 5, which states:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of the Community.

Article 5 is of general application and one of the central Articles of the Treaty. It operates by imposing obligations which have both positive and negative aspects: in its positive aspect, it requires States to take all measures which are necessary to fulfil their obligations arising from the Treaty and from Community measures based on the Treaty, and generally to facilitate the achievement of the Community's tasks; while in its negative aspect, EEC Art 5 requires States to refrain from activities which could imperil the attainment of the Treaty's objectives.

These Community obligations are binding on Member States irrespective of their institutional or constitutional structure<sup>6</sup> and consequently on all national authorities, whether they are executive, legislative or judicial. The fact that the executive represents the Member State *vis-à-vis* the Community institutions does not free the legislature or judiciary from their obligation to respect and execute Community law: this is so even if, according to their respective national constitutions, they are independent and sovereign.<sup>7</sup> In fact, the ECJ expressly stated in *von Colson*<sup>8</sup> that the duty under EEC Art 5 was binding on all authorities of the Member States including, for matters within their jurisdiction, the courts.

The rulings of the ECJ to this effect are the logical consequences of the supremacy and uniform validity of Community law and, as such, it would be contrary to their nature if the execution of Community obligations depended on the institutional structure of each Member State. Time and again, the ECJ has insisted that difficulties caused by such structures cannot be permitted to hamper the effective operation of Community law.<sup>9</sup> Further, it has stressed that the national legal order and its institutions must be altered in a way which ensures the prompt implementation of Community

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<sup>6</sup> Case 77/69 *Commission v. Belgium* [1970] ECR 237 at 243; Case 8/70 *Commission v. Italy* [1970] ECR 961 at 966.

<sup>7</sup> Note 6 *ibid.*

<sup>8</sup> Case 14/83 *von Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891 at 1909.

<sup>9</sup> Case 48/71 *Commission v. Italy* [1972] ECR 527 at 532; Case 39/72 *Commission v. Italy* [1973] ECR 101 at 115; Case 30/72 *Commission v. Italy* [1973] ECR 161 at 172.

obligations. In *Commission v. Italy*,<sup>10</sup> a case dealing with the prolonged delay of the State in disbursing premiums to farmers, as set by an agricultural Regulation, the ECJ firmly ruled:<sup>11</sup>

It falls to a Member State in accordance with the general obligations imposed on Member States by Article 5 of the Treaty, to recognize the consequences, in its internal order, of its adherence to the Community and if necessary, to adapt its procedures for budgetary provision in such a way that they do not form an obstacle to the implementation, within the prescribed time-limits, of its obligations within the framework of the Treaty.

More particularly, the ECJ has inferred the notion that the principle of Community solidarity laid down in EEC Art 5 imposes a duty on the national courts to ensure the legal protection of the rights which citizens derive from directly effective Community provisions.<sup>12</sup> This was confirmed in *Rewe*<sup>13</sup> where the ECJ said:<sup>14</sup>

Applying the principle of cooperation laid down in Article 5 of the Treaty it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Similarly, in *Comet*,<sup>15</sup> the ECJ reiterated its position stating:<sup>16</sup>

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<sup>10</sup> Case 30/72 *Commission v. Italy* [1973] ECR 161.

<sup>11</sup> Note 10 at 172.

<sup>12</sup> e.g. Case 265/78 *H. Ferwerda B.V. v. Produktschap voor Vee en Vlees* [1980] ECR 617 at 629.

<sup>13</sup> Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>14</sup> Note 13 at 1997.

<sup>15</sup> Case 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.

<sup>16</sup> Note 15 at 2053.

...in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.

In addition to the obligations imposed by the EEC Art 5, the ECJ has sought to maintain the effective operation of the Community legal order through its development of the doctrine of direct effect.

#### (4) THE DOCTRINE OF DIRECT EFFECT

One of the most important features of the Community legal order is that provisions of Community law produce direct effects in the national legal order of the Member States. Such provisions ensure the respect of Community obligations not only by the Community institutions themselves but also, more importantly, by the Member States or even, in some cases, by individuals.

It has been noted by Bebr<sup>17</sup> that the ECJ began to develop the notion of direct effect at the same time as it defined the novel character of the Community legal order. He continued:<sup>18</sup>

There could hardly be a better proof for the close, almost inherent relation of the notion of provisions directly effective with the specific nature of the Community legal order. This is, furthermore, confirmed by the Court's recognition of individuals as subjects of the Community legal order....These provisions facilitate and reinforce the supremacy of Community law that individuals may invoke before national courts which must apply them disregarding so contrary national provisions.

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<sup>17</sup> Bebr, *Development of Judicial Control of the European Communities* at 548 (1981).

<sup>18</sup> Note 17 *loc. cit.*

The doctrine of direct effect was first enunciated in the ECJ's seminal judgment of *Van Gend en Loos*.<sup>19</sup> The case involved the reclassification of a chemical product for customs purposes which had resulted in an increase in the duty payable on the importation of the product into the Netherlands. An importer objected to this increase on the ground that it constituted an infringement of EEC Art 12 which prohibits States from "introducing between themselves any new customs duties on imports or any charges having equivalent effect." The customs authorities opposed such a claim by the importer. Consequently, the *Tariefcommissie*<sup>20</sup> in a reference under EEC Art 177 requested a preliminary ruling as to the meaning and effect of EEC Art 12.

Before the ECJ the Dutch government, on behalf of its customs authorities, argued that EEC Art 12 was addressed to Member States and could not therefore be invoked by private individuals. Moreover, the EEC Treaty had expressly provided enforcement procedures at the suit of the European Commission or Member States under EEC Arts 169 and 170. Accordingly this proceeding prevented individuals from invoking a violation of a Community obligation by a State before a national court unless the Member State's Constitution permitted this, *i.e.* direct effect would depend on constitutional recognition by Member States.<sup>21</sup>

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<sup>19</sup> [1963] ECR 1.

<sup>20</sup> A Dutch administrative tribunal dealing with fiscal appeals.

<sup>21</sup> The Netherlands Constitution then in force had a provision dealing with this topic - the question in point was not what it meant but *who decided* what it meant. The ECJ could not, as is generally accepted, decide what the Netherlands Constitution meant. Consequently, the argument put forward



The ECJ, however, intended to offer a "direct legal protection of the individuals rights" of nationals of those States. Despite the arguments forwarded, the ECJ held EEC Art 12 to be of direct effect, stating -<sup>22</sup>

...the Community constitutes a new legal order...the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

These rights would arise -<sup>23</sup>

...not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Moreover, the ECJ maintained that the direct infringement proceedings before it did not deprive individuals of their right to invoke such a violation before a national court.<sup>24</sup>

#### (5) DIRECT EFFECT AND DIRECT APPLICABILITY

In its development of the doctrine of directly effective Community provisions to ensure protection of individual rights before national courts, the ECJ uses an almost standard wording, with some variations, to describe the provisions which have "a direct effect in the legal orders of the Member States and confer on individual rights which national courts

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was that a reference under EEC Art 177 was impossible because the ECJ had *no jurisdiction* to rule on the effect of an international treaty on a Dutch national: that question was exclusively a matter for a Dutch court applying its own constitutional law.

<sup>22</sup> Note 19 at 12.

<sup>23</sup> Note 19 at 12.

<sup>24</sup> Note 19 at 13.

must protect."<sup>25</sup> In most instances, this right means the right of an individual to invoke a Community provision thereby implying the non-application of any national law contrary to it.

It is a basic principle of Community law that a directly effective provision of Community law always prevails over a provision of national law. Such principle, although not found in the three Treaties establishing the European Communities, was proclaimed by the ECJ in its developing jurisprudence; it applies irrespective of the nature of the Community provision<sup>26</sup> or that of the national provision<sup>27</sup> and irrespective of whether the Community provision came before or after the national provision. In all cases, the national provision must give way to Community law.

This basic rule was underlined in the second *Simmenthal* case<sup>28</sup> in which the ECJ held<sup>29</sup> that it was the duty of a national court to give full effect to the Community provisions and not to apply any conflicting provisions of national legislation, even if it had been adopted subsequently. It also held that the national court should not wait for the national law to be set aside either by a constitutional court or by the legislature.

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<sup>25</sup> Case 13/76 *Donà v. Mantero* [1976] ECR 1333 at 1341.

<sup>26</sup> Whether constitutive Treaty, Community act or agreement with a non-Member State.

<sup>27</sup> Whether constitution, statute or subordinate legislation.

<sup>28</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

<sup>29</sup> Note 28 at 643.

However, in determining that certain provisions of EC law are to confer rights on individuals which national courts are bound to protect, the ECJ does not always use a uniform expression. Sometimes it speaks of "direct applicability,"<sup>30</sup> other times of "direct effect"<sup>31</sup> and even of "immediate effect."<sup>32</sup>

There has been much academic debate between legal writers as to the difference in wording.<sup>33</sup> The basic problem is this: if one interprets "directly applicable" in EEC Art 189 to mean the same thing as "directly effective,"<sup>34</sup> it would seem to follow that only regulations can be directly effective. If, on the other hand, one treats the two terms as meaning something different,<sup>35</sup> one has to find a suitable meaning for "directly applicable," a meaning that refers to some quality

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<sup>30</sup> Case 13/68 *SpA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453 at 462.

<sup>31</sup> Case 26/62 *N.V. Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 at 13; Case 57/65 *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205 at 210.

<sup>32</sup> Case 34/73 *Variola SpA v. Amministrazione italiana delle Finanze* [1973] ECR 981 at 990.

<sup>33</sup> For a summary of the different views, see Steiner, 'Direct Applicability in EEC Law - A Chameleon Concept' (1982) 98 LQR 229.

<sup>34</sup> Bebr, 'Directly Applicable Provisions of Community Law: The Development of a Community Concept' (1970) 19 ICLQ 257.

<sup>35</sup> This theory was first enunciated by Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' 9 CML Rev (1972), 425. Other authors who regard the two terms as having different meanings include Schermers & Waelbroeck, *Judicial Protection in the European Communities* 4th ed., para. 219 at 111; and para. 239 at 124-125 (1987); Dashwood, 'The Principle of Direct Effect in European Community Law' (1978) 16 *Journal of Common Market Studies* 229 at 230; and Brinkhorst, 8 CML Rev (1971), 386 at 390-391.

possessed by regulations but not by other instruments of Community law.

The ECJ, as has been indicated above, does not appear to pay much attention to the wording of the treaties on this point and seems to use the two expressions to mean the same thing.<sup>36</sup>

Although the present work does not seek to discuss these issues further, it is intended to differentiate between the two terms along the lines suggested by Steiner.<sup>37</sup>

Direct effect is therefore defined as the principle by which certain provisions of Community may confer rights or impose obligations on individuals, which national courts are bound to recognise and enforce. Direct effect therefore concerns the penetration of Community rules, where appropriate, down to the level of the individual. Such rules may be contained not only in the EEC Treaty provisions and in Regulations but also in Decisions and Directives. The criteria for recognising directly effective Community law may be culled from the jurisprudence of the ECJ. As Steiner has said:<sup>38</sup>

It must be clear and precise, unconditional, requiring no further act of implementation by member-States or Community institutions, and leaving member-States no real discretion in implementation.

On the other hand, "direct applicability" within the meaning of EEC Art 189 implies that a Regulation needs no further intervention on the part of the Member States or

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<sup>36</sup> Pescatore, 'The Doctrine of 'Direct Effect': An Infant Disease of Community Law' (1983) 8 EL Rev 155, Note 2.

<sup>37</sup> Note 33 generally.

<sup>38</sup> Steiner, *loc.cit.* at 240.

Community institutions in order to be complete: it is directly or immediately enforceable as it stands.<sup>39</sup> The notion of direct applicability therefore concerns the manner in which a provision of Community law may become part of the national legal order.

#### (6) JUDICIAL REMEDIES AND DIRECT EFFECT

The operation of the doctrine of direct effect depends, by implication, on the range and effectiveness of the judicial remedies available to individuals under national laws which they may invoke before national courts. Rideau has said:<sup>40</sup>

La diversité des interventions des Etats membres, qui découle d'éléments communautaires, se traduit nécessairement par une grande variété des modalités d'exercice du rôle des pouvoirs nationaux. En dépit de cette multiplicité, le principe fondamental de l'autonomie institutionnelle des Etats membres domine l'utilisation des systèmes juridiques nationaux. Les organes compétents, les procédures à utiliser pour la mise en oeuvre du droit communautaire sont déterminés par les prescriptions constitutionnelles étatiques. La pratique des organes communautaires confirme cette constatation qui se dégage avec une vigueur particulière de la jurisprudence de la Cour des Communautés européennes.

This concept of procedural autonomy of Member States entitles each national legal system "to lay down the procedural rules for proceeding designed to ensure the protection of the rights which individuals acquire through the direct effect of Community laws...."<sup>41</sup> This principle is subject to the proviso that such procedural rules are not to

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<sup>39</sup> Steiner, *loc. cit.* at 238.

<sup>40</sup> Rideau, 'Le Rôle des Etats Membres dans l'Application du Droit Communautaire' A.F.D.I. 1972.864 at 884-885.

<sup>41</sup> Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at 1997; Case 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043 at 2053.

be less favourable than those governing similar rights of action in domestic matters.<sup>42</sup>

Although the ECJ has clearly enunciated the principle of direct effect and the individual's need for a remedy, comparatively speaking it has not been as forthright and precise in its jurisprudence in indicating the nature of proceedings in which Community law may be pleaded and the type of remedy the individual should be entitled to demand. In *Salgoil*<sup>43</sup> for example, it was decided that EEC Arts 31 and 32 required national authorities and in particular the relevant domestic courts -<sup>44</sup>

...to protect the interests of those persons subject to their jurisdiction who may be affected by any possible infringement of the said provisions, by ensuring for them direct and immediate protection of their interests....

However the ECJ did not elaborate further.

In reference to this judgment, the ECJ in *Bozzetti*<sup>45</sup> declared that -<sup>46</sup>

...it is for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case.

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<sup>42</sup> Note 41 *ibid*.

<sup>43</sup> Case 13/68 *SpA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453.

<sup>44</sup> Note 43 at 462-463.

<sup>45</sup> Case 179/84 *Bozzetti v. Invernizzi SpA* [1985] ECR 2301.

<sup>46</sup> Note 45 at 2317-2318.

Even in *Simmenthal*,<sup>47</sup> a case in which the function of national courts was explained at great length, no directions were given as to either the nature of the proceedings or to the type of remedy. Although emphasising that "every national court must...apply Community law in its entirety and protect rights which the latter confers on individuals"<sup>48</sup> giving Community provisions their "full effect,"<sup>49</sup> the ECJ refrained from defining the precise task of national courts.

In *Harz v. Deutsche Tradax*,<sup>50</sup> though, the ECJ was more forthright in its insistence on the intensity of the protection needed to guarantee EC rights and sought to impose an obligation on Member States to afford "real protection" for breach of EC law. It stated:<sup>51</sup>

"Although...full implementation of the directive does not require a specific form of sanction for breach of the prohibition of discrimination, it does entail that that sanction be such as *to guarantee real and effective judicial protection*. Moreover it must also have a *real deterrent effect* on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be *adequate* in relation to the damage sustained." [Emphasis supplied.]

This case is of central importance and highlights the fundamental problem of reconciling the need for "equality of protection" under domestic law with the necessity for the "real protection" of EC rights. At the present time, the ECJ

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<sup>47</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

<sup>48</sup> Note 47 at 643.

<sup>49</sup> Note 47 at 643.

<sup>50</sup> Case 79/83 *Harz v. Deutsche Tradax GmbH* [1984] ECR 1921.

<sup>51</sup> Note 50 at 1941.

requires that national courts must afford the same degree of legal protection to an individual for breach of EC law as would be available for breaches of a similar nature in the domestic context.<sup>52</sup> In this respect, it seems to regard this principle of non-discrimination in the provision of remedies on a par with the principle of effectiveness of the remedy provided. It is submitted, however, that this is not the case since, in situations under national law, non-discrimination in treatment may often deny the effective protection that the individual needs to guarantee his EC rights.

The ECJ maintains that the Member States remain entitled to define the relevant rules of procedure for the enforcement of Community law, e.g. the length of the limitation period within which an action must be commenced. Accordingly, failure to bring such proceedings in time results in the failure to provide "real and effective protection" for an individual's EC rights. Such was the result, despite rulings by the ECJ that certain national levies were contrary to EC law, in *Rewe*<sup>53</sup> and *Comet*.<sup>54</sup>

In addition, should a national of a Member State bring an action by the wrong domestic procedure or before the wrong system of courts, this can result in his losing the opportunity to protect his directly effective rights. Of even greater concern are the instances under national law where there is an *insufficient or no available remedy*, e.g.

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<sup>52</sup> Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805.

<sup>53</sup> Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>54</sup> Case 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.



restitution of money paid over due to mistake of law which is irrecoverable in England.<sup>55</sup>

Despite these underlying problems, the rulings of the ECJ have disclosed that an enforceable Community right may be a ground for claiming a refund of charges levied in breach of a Community rule,<sup>56</sup> or possibly for seeking damages caused by such a breach<sup>57</sup> or even seeking interim injunctive relief to stop a breach of EC law.<sup>58</sup>

Accordingly the next three sections will deal with these remedies sought for breach of a Community right - reimbursement or restitution, damages and interim relief.

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<sup>55</sup> See *infra* at 63.

<sup>56</sup> See *infra* at 18ff.

<sup>57</sup> See *infra* at 32ff.

<sup>58</sup> See *infra* at 41ff.

(7) REIMBURSEMENT OF CHARGES LEVIED IN BREACH OF EC LAW

The question whether individuals have a right to reimbursement of charges levied in breach of Community law was first raised in the cases of *Rewe*<sup>59</sup> and *Comet*,<sup>60</sup> although indirectly since in both cases the ECJ had been called upon to determine whether, by virtue of Community law, an individual had the right to demand such reimbursement even after the national limitation period for restitutionary actions had expired.

In *Rewe*, an importer sought to obtain a refund of charges he had paid in 1968 for a phyto-sanitary inspection of fruits imported from another Member State. However, it was not until 1973 that the ECJ<sup>61</sup> declared such charges to be of equivalent effect to customs duties prohibited by EEC Art 13. When the importer began proceedings, the national limitation period for such an action had already expired long before the ECJ's declaratory judgment.<sup>62</sup> The *Bundesverwaltungsgericht*, the highest German administrative tribunal, enquired in its referral whether the time-limit set by the German law for such an action could prevent the exercise of a Community right

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<sup>59</sup> Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>60</sup> Case 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.

<sup>61</sup> Case 39/73 *Rewe-Zentralfinanz eGmbH v. Direktor der Landwirtschaftskammer Westfalen-Lippe* [1973] ECR 1039.

<sup>62</sup> Under the *Verwaltungsgerichtordnung* (German Code of Procedure before the Administrative Court) art 58, the importer must make his claim within one month of the date the national authority imposed the charge.

derived from a directly effective Treaty provision, and so preclude a claim from the past.

Warner AG, in his Opinion, determined that the crux of the plaintiff's case was its contention that Community law not only invalidated the national legislation imposing the levies to which it was assessed, but itself conferred upon it a right of action for restitution of those levies, which right could not be limited by any provision of national law. Warner AG stated:<sup>63</sup>

I do not think that any such independent right of action was conferred on the plaintiffs by Community law: I think that it was for their national laws to lay down the remedies to which they were entitled in consequence of the invalidity of the fiscal legislation in question.

The other case, *Comet*, concerned a litigant in a similar situation challenging, before a Dutch court, the incompatibility of a decision of a national body with Community law after the national limitation period for raising such an action had expired: the same Opinion of Warner AG was appendaged to the decision.

However, in its judgment, the ECJ did not pronounce directly on the right to restitution by reason of the formulation of the questions referred to it. The ECJ merely stated<sup>64</sup> that, as a consequence of the principle of co-operation enshrined in EEC Art 5, it was for the national jurisdictions to ensure the judicial protection of individual rights deriving from the direct effect of Community provisions.

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<sup>63</sup> Note 59 at 2004.

<sup>64</sup> Note 60 at 2052-2053.

In the subsequent case of *Cucchi v. Avez*,<sup>65</sup> the ECJ declared a pecuniary charge levied on sugar in application of an Italian legislative measure to be incompatible with a Community rule. One of the questions referred to the ECJ stated:<sup>66</sup>

From the date when the prohibition entered into force, have individual traders who have imported sugar...from other [Member States of the EEC] an individual right not to pay a pecuniary charge...and have they accordingly the right to claim reimbursement where payment has been made?

For Reischl AG, this issue was quite clear. Linking the right to reimbursement to the direct effect of a Community norm, he declared:<sup>67</sup>

...[I]t is possible for individuals concerned to rely on the admissibility of the national measure which results from directly applicable provisions of a Community regulation. According to the factual circumstances and the provisions of national law this may produce the result either that the charge at issue need not be paid or, if it has already been paid, that it must be refunded.

In its reply, the ECJ did not expressly consider the question of restitution and merely stated that the violation of Community law could be invoked before national courts.<sup>68</sup>

It was not until the case of *Pigs & Bacon Commission v. McCarren*<sup>69</sup> that for the first time the ECJ expressly admitted the Community basis of the right to restitution of national taxes levied in violation of the EEC Treaty. The case

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<sup>65</sup> Case 77/76 *Fratelli Cucchi v. Avez SpA* [1977] ECR 987.

<sup>66</sup> Note 65 at 991-992.

<sup>67</sup> Note 65 at 1024.

<sup>68</sup> Note 65 at 1011.

<sup>69</sup> Case 177/78 *Pigs & Bacon Commission v. McCarren & Co Ltd* [1979] ECR 2161.

concerned the system of commercialisation of the pigmeat industry in the Republic of Ireland: according to the national legislation, a tax was levied on producers of pigmeat whereas a subsidy was accorded to exporters by the governmental agency which administered the system. Having ascertained that the tax so levied was incompatible with Community law and particularly with the common organisation of the market in the sector under consideration, the ECJ made the following declaration:<sup>70</sup>

In principle any trader who is required to pay the levy has therefore the right to claim the reimbursement of that part of the levy which is thus devoted to purposes incompatible with Community law. However, it is for the national court to assess, according to its national law, in each individual case, whether and to what extent the levy paid may be recovered and whether there may be set off against such a debt the sums paid to a trader by way of export bonus.

Further development of the principle of reimbursement, and its interaction with the concept of direct effect and the judicial protection of individual rights, was discussed in *Denkavit italiana*.<sup>71</sup> It has been said of the case that -<sup>72</sup>

...[elle] est au confluent de deux courants dans la jurisprudence de la Cour, d'une part, celui relatif à la théorie de l'effet direct et, d'autre part, celui relatif à la protection juridictionnelle concrète des individus en cas de violation du droit communautaire par les Etats membres.

In *Denkavit italiana*, the Italian finance administration had levied public health charges on the importation of milk and milk products. When an Italian court held the charges to

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<sup>70</sup> Note 69 at 2192.

<sup>71</sup> Case 61/79 *Amministrazione delle Finanze dello Stato v. Denkavit italiana Srl* [1980] ECR 1205.

<sup>72</sup> Hubeau, 'La répétition de l'indu en droit communautaire' R.T.D.E. 1981.442 at 445.

have an effect equivalent to a customs duty prohibited by EEC Art 12, the finance administration was ordered to repay the charges. When it appealed, the appellate court made a reference to the ECJ enquiring, *inter alia*, whether the repayment of sums levied by way of customs charges was compatible with Community rules, and in particular with the basic intention of EEC Arts 13(2) and 92.

Reischl AG stated<sup>73</sup> that it was possible to find support for the right to reimbursement of illegally-levied taxes by tracing through the jurisprudence of the ECJ back to *Rewe*. The ECJ in that case did not expressly deal with the question of repayment because the limitation periods stipulated under national procedural law had already expired. Reischl AG submitted, however, that the ECJ had assumed by implication that there was such a right to reimbursement since, in regard to the questions asked, the ECJ pointed out that the prohibition laid down in EEC Art 13 had direct effect and conferred rights on individuals which national courts had to protect.

In this way, Reischl AG emphasised the existence of "[le] confluent de deux courants" in the ECJ's jurisprudence. For him it followed naturally from the direct effect of Community law that payments which had been wrongly levied were, in principle, to be refunded. Otherwise the implementation of Community law might be thwarted by a Member State levying similar charges contrary to the provisions of Community law.

The ECJ reaffirmed that it was incumbent upon the national jurisdictions, in applying the fundamental rule of the

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<sup>73</sup> Note 71 at 1232-1233.

primacy of Community law, to assure the safeguard of the rights which litigants drew, by virtue of the EEC Treaty, from the direct effect of the prohibition of taxes having equivalent effect to customs duties.<sup>74</sup>

At the same time, it admitted<sup>75</sup> that the conditions and means of exercising the right to contest taxes contrary to Community law or to reclaim them would have to be determined by the judicial order of each Member State.

A few days before *Denkavit italiana*, the ECJ had delivered judgment in an analogous case, *Hans Just*.<sup>76</sup> In that case the plaintiff company produced and imported wines and spirits in Denmark. The company was liable to pay excise duties to the Danish Treasury on its total sales of spirits. The company argued that it had overpaid excise duties, such payment being made under protest since the rate of tax was incompatible with EEC Art 95. Consequently, it sought repayment of that sum and reserved the right to claim all the tax it had overpaid between the date Denmark joined the Community and the date of the action. On a preliminary ruling to the ECJ, Reischl AG stated that since EEC Art 95 had direct effect it created rights which national courts had to protect. He continued:<sup>77</sup>

The consequence of this direct effect is that from the moment of Denmark's accession, that is to say, from 1 January 1973, those subject to the law may rely before the national courts on the provision laid down in the first paragraph of Article 95, which in this connexion takes precedence over national rules

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<sup>74</sup> Note 71 at 1226.

<sup>75</sup> Note 71 at 1227.

<sup>76</sup> Case 68/79 *Hans Just I/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 501.

<sup>77</sup> Note 76 at 530-531.

to the contrary. If individuals rely upon this provision the levying of charges which are contrary to Article 95 must be declared inadmissible. If the charges contrary to the provision have already been paid, then...from the point of view of Community law the direct effect of that provision involves in addition that they should be repaid.

In its judgment the ECJ stated:<sup>78</sup>

It is for the Member States to ensure the repayment of charges levied contrary to Article 95 in accordance with the provisions of their internal law.....<sup>79</sup>

The issues facing the ECJ in respect of reimbursement of national charges levied in contravention of Community law were brought into focus at a colloquium held in 1976:<sup>80</sup> three reports were presented which discussed the possible development under Community law of a right to reimbursement of such charges.

In their report, Karpenstein & Maestripieri<sup>81</sup> suggested possible solutions to the question (as it stood at that time), the most interesting and indicative of later jurisprudential development resting on the distinction between the two judicial orders - Community and national - in the areas in which the former did not dictate specific rules, e.g. in the

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<sup>78</sup> Note 76 at 524.

<sup>79</sup> It should be noted that one of the problems highlighted by the decision was whether "passing on" was to reduce the claim - this would happen under Danish law if the matter were solely a national one. The ECJ stated (Note 76 at 523) that there was nothing in Community law - "to prevent national courts from taking into account...the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchases."

<sup>80</sup> *Etudes suisses de droit européen*, Vol 18, s.v. *La restitution de taxes perçues indûment par l'Etat en droit Communautaire*: Rapports communautaires de Karpenstein & Maestripieri; Leleux; et Waelbroeck (1976).

<sup>81</sup> Karpenstein & Maestripieri, *op. cit.* at 201.



matter of procedure, and which were instead substituted by those rules in place in the national legal order. They contended:<sup>82</sup>

L'applicabilité directe de dispositions communautaires et leur primauté sur le droit national ne requièrent pas nécessairement une adaptation de toutes les règles nationales de procédure destinées à préserver la paix et la sécurité juridique.

In their conclusion, they supported this solution as the most reasonable since it did not overturn the national judicial orders in which the reception of Community law remained difficult. They indicated, however, that the problem with this solution was that it did not assure the uniform application of Community law.

It is this problem that was seized upon by Leleux in his report.<sup>83</sup> He opposed any acceptance of national law putting an obstacle in the way of recovery of duties or taxes illegally levied by national authorities since this would prevent Community law from having its full effect and would constitute a refusal to protect rights which the individual drew from Community law and which the national judge was obliged to protect. He concluded by stating that any national rules of procedure which could be opposed to individual rights drawn from Community law thereby presented<sup>84</sup> "le danger d'entravailler une porte par laquelle pourraient s'engouffrer toutes sortes d'autres exceptions que des lois de prescription."

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<sup>82</sup> Karpenstein & Maestripiéri, *op. cit.* at 202.

<sup>83</sup> Leleux, *op. cit.* at 209.

<sup>84</sup> Leleux, *op. cit.* at 213.

The last report of Waelbroeck<sup>85</sup> considered the right to restitution if it were to be regulated (i) solely by national law; (ii) solely by Community law; and (iii) governed concurrently by both national and Community law. Like Karpenstein & Maestriperi, he concluded:<sup>86</sup>

Le principe du remboursement des droits indûment perçus trouve son fondement dans le droit communautaire. Néanmoins, les Etats sont libres, sans pouvoir toucher à ce principe, de régler les modalités et les conditions du remboursement, notamment en imposant des conditions de délai et d'intérêt à agir.

With the growth of jurisprudence from the ECJ concerning the right to reimbursement along the lines envisaged by Karpenstein & Maestriperi and by Waelbroeck, later commentators discussed the weakness of the enforcement of a directly effective Community right through national procedure - the problem highlighted by Leleux's report.

Bebr, for instance,<sup>87</sup> viewed Rewe as revealing "the inherent shortcoming" of the Community legal order: a Community right of an individual being enforced by national remedies before national courts pursuant to national rules of procedure - a notion which hardly promoted a uniform application and efficacy of Community law. On the contrary he said it could create, in the long term, a serious barrier to the uniform exercise of a directly enforceable Community right. However he did admit that the particularly complex problem of recognising the supremacy of a Community right in

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<sup>85</sup> Waelbroeck, *op. cit.* at 215.

<sup>86</sup> Waelbroeck, *op. cit.* at 220.

<sup>87</sup> Bebr, *Development of Judicial Control of the European Communities* at 610 (1981).

the absence of Community procedural requirements in part explained the ECJ's unusual reserve in its jurisprudence; but that the directly effective Community right, as a title for refund of charges illegally levied, was undoubtedly weakened by the considerable differences in the national rules of procedure.

Hubeau, for his part,<sup>88</sup> recognised the undeniable fact that the reference to national laws had the consequent effect of varying the impact of a directly effective provision according to the Member States in which the rights conferred by that State were invoked. Nevertheless it hardly seemed possible or reasonable to maintain different solutions concerning the restitution of national taxes levied in violation of Community law. Nor could a solution based entirely on the ECJ's jurisprudence be a possible way of harmonising the different national regimes because of the numerous technical details to be clarified and the case-by-case nature of the development "...aurait en outre perpétué un état d'insecurité et provoqué un grande nombre de questions à titre préjudiciel."<sup>89</sup>

Even the minimalist Community solution retained by the ECJ would in itself, he proposed, provoke controversies which national jurisdictions would have to resolve themselves. In effect, the reference to national law was not unconditional. The regime for the reimbursement of taxation incompatible with Community law could not be less favourable than that for

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<sup>88</sup> Hubeau, 'La répétition de l'indu en droit communautaire' R.T.D.E. 1981.442.

<sup>89</sup> Hubeau, *loc. cit.* at 448.

purely domestic remedies of the same type. He suggested that if it were assumed that where a system of legal procedures in a State was not quite homogenous and which was therefore already prone to disputes, such problems would be multiplied in relation to Community law.

He concluded that although such a state of affairs was regrettable, in the present state in the development of Community law and having had regard to practical necessities, it was nevertheless inevitable for there was no judicial order which had fully worked out, for example, the precise rules for procedure and prescription.

Barav<sup>90</sup> underlined the relationship between the restitution of amounts levied by virtue of a national measure contrary to the EEC Treaty and the direct effect of the violated Community provision. In a strict sense the right conferred upon individuals by such a directly effective provision, in prohibiting the levying of taxes, was not one to be reimbursed in case of payment not due but one of not seeing oneself unduly taxed. Restitution of a sum that one had been obliged to pay was only an imperfect substitute of the right to refuse irregular taxation. He cited *Bresciani*,<sup>91</sup> a case in which the ECJ recognised that the provision of the Yaoundé Convention providing for the abolition of charges having equivalent effect to customs duties conferred<sup>92</sup> "on Community

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<sup>90</sup> Barav, 'La répétition de l'indu dans la jurisprudence de la Cour de Justice des Communautés Européennes' *Cah. dr. europ.* 1981.507.

<sup>91</sup> Case 87/75 *Bresciani v. Amministrazione italiana delle Finanze* [1976] ECR 129.

<sup>92</sup> Note 91 at 142.

citizens *the right*, which the national courts of the Community must protect, *not to pay a Member State*, [such] a charge...."

In Barav's opinion, the right to restitution derived from the right to non-payment and, although indirectly, the ECJ was called on to pronounce more often on the first. In this regard, the importance of direct effectiveness was propounded by Reischl AG in both *Hans Just* and *Denkavit italiana*. In the latter case, for example, the Advocate General maintained<sup>93</sup> that it followed -

...further from the meaning and the purpose of direct applicability that, in principle, payments made on the basis of national law which is incompatible with Community law must be refunded.

If this were not the case, Reischl AG maintained, the implementation of Community law might be thwarted by the fact that a Member State could levy such charges contrary to the provisions of Community law.<sup>94</sup>

Barav suggested that the ECJ envisaged two complementary ideas. By declaring the direct effect of a Community norm, it specified that the protection of rights engendered by such a norm devolved upon the national jurisdictions, notably by virtue of EEC Art 5. Thus in *Hans Just* and *Denkavit italiana*, the ECJ went back to the formulas it had employed in *Rewe* and *Comet* relative to the obligation of national jurisdictions to ensure by virtue of EEC Art 5, the safeguard of rights created for the benefit of individuals by directly effective Community

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<sup>93</sup> Case 61/79 *Amministrazione delle Finanze dello Stato v. Denkavit italiana Srl* [1980] ECR 1205 at 1232.

<sup>94</sup> Note 93 at 1234. Direct effect, in so far as it was the basis for the right to restitution, was equally admitted by the Commission in Case 177/78 *Pigs & Bacon Commission v. McCarren & Co Ltd* [1979] ECR 2161 at 2180.

provisions. Having recognised, notably in *Pigs & Bacon Commission v. McCarren and Hans Just* that the direct effect of a Community provision prohibiting the levying of a certain tax gave rise to a right in restitution, it followed that the obligation for the judge to assure the respect of the rights derived by individuals from the direct effect of a Community rule implied a judicial condemnation of the State to reimburse the levy. This same solution resulted in both *Ariete*<sup>95</sup> and *MIRECO*.<sup>96</sup>

One can wonder, he continued, in what measure the direct effectiveness eclipsed the first consideration which should inspire the right to reimbursement of the undue money, viz. that of the illegality of the levy. If it were admitted that the violation of the Treaty constituted the true basis for the right to restitution the existence of such a right was thereby recognised even though a Community provision deprived of direct effect was violated by the State. Barav concludes his article:<sup>97</sup>

...[E]n raison de la structure de la Communauté, l'individu, titulaire d'un droit dérivant de l'ordre juridique communautaire, est renvoyé à l'arsenal des voies de droit nationales pour l'exercice d'une action contentieuse tenant à revendiquer le respect d'un tel droit.

It is submitted that the ECJ, through its jurisprudence, has established the necessary right of an individual to claim reimbursement of charges levied by national authorities in

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<sup>95</sup> Case 811/79 *Amministrazione delle Finanze dello Stato v. Ariete SpA* [1980] ECR 2545.

<sup>96</sup> Case 826/79 *Amministrazione delle Finanze dello Stato v. Sas MIRECO* [1980] ECR 2559.

<sup>97</sup> Barav, *loc. cit.* at 538.

breach of EC law, such right being derived directly from the infringed Community provision. This requirement in practice, however, causes difficulties in the national courts of the Member States considered in this work. For example, a claim under present English law could fail if the levy were paid over to the public authority due to a mistake of law.<sup>98</sup> As such, this would breach the necessity for "real and effective protection" demanded by the ECJ.

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<sup>98</sup> See *infra* at 63ff.

## (8) DAMAGES FOR BREACH OF COMMUNITY LAW

Although there have been several references to the ECJ of cases in which the claim in the national court has been founded on a claim in damages,<sup>99</sup> there is a dearth of judicial pronouncements by the ECJ from which to deduce a possible right of an individual to damages in the national court on the basis of a breach of Community law by the Member States.

In this respect, the case of *Hans Just*<sup>100</sup> is indicative of the attitude of the ECJ. In that case the plaintiff company was a producer and importer of wines and spirits. When the Danish government increased the tax on imported spirits, the plaintiff company alleged such increase to be incompatible with EEC Art 95. During proceedings before the ECJ, the company claimed *inter alia* that the damage it had suffered as a consequence of the collection of the increased tax "not only caused a serious reduction in the profits of Hans Just but also compelled it to reduce staff."<sup>101</sup> Since Danish law did not permit the recovery of moneys paid over as a result of a mistake of law, the company argued in effect that the ECJ should recognise that the doctrine of direct effect created a Community right either to restitution or to damages which national law could not lawfully abridge.

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<sup>99</sup> The most notable case in this respect is Case 43/75 *Defrenne v. SABENA* [1976] ECR 455. More recent cases include Case 181/82 *Roussel Laboratoria BV v. Netherlands* [1983] ECR 3849 and Case 197/84 *Steinhauser v. City of Biarritz* [1985] ECR 1819.

<sup>100</sup> Case 68/79 *Hans Just I/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 501.

<sup>101</sup> Note 100 at 509.



In his Opinion, Reischl AG stated that:<sup>102</sup>

Proof of damage or impoverishment as a precondition for bringing proceedings is known in the legal systems of all the Member States and in the Community legal system itself as an expression of the general principle of natural justice.

In its judgment, the ECJ founded the duty of national courts to find the appropriate remedy not on the doctrine of direct effect alone but on the duty of co-operation in EEC Art 5 under which the Member States are obliged to "take all appropriate measures...to ensure fulfilment of the obligations arising out of" the Treaty. The ECJ stated that there was nothing in Community law to prevent a national court from taking into account -<sup>103</sup>

... the damage which an importer may have suffered because the effect of the discriminatory or protective tax provisions was to restrict the volume of imports from other Member States.

Durand has suggested<sup>104</sup> that the decision of the ECJ marked an important point in the development of the concept of direct effect in its recognition that a claim to damages may be an "appropriate measure" within the meaning of EEC Art 5.

However the only direct pronouncement on this point by the ECJ was in *Russo v. AIMA*,<sup>105</sup> in which it examined more closely a claim based on damages for breach of Community law.

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<sup>102</sup> Note 100 at 532.

<sup>103</sup> Note 100 at 523.

<sup>104</sup> Durand, 'Enforceable Community Rights and National Remedies' [1987] Denning LJ 43 at 54.

<sup>105</sup> Case 60/75 *Russo v. AIMA* [1976] ECR 45.

In 1973, when the world price of certain cereals rose above the EEC target price, it resulted in a shortage and consequent price rise of durum wheat on the Italian market. In order to subsidise consumers, AIMA, the Italian intervention agency for agriculture, purchased durum wheat on the world market and sold it on the domestic market at prices well below the purchase price and below the intervention price fixed by Community regulations on the common markets in cereals.<sup>106</sup> Consequently one of the domestic producers, Russo, brought an action claiming damages against AIMA, the amount representing the difference between the price he had received and the price he would have legitimately expected if AIMA had not intervened.

On a reference to the ECJ, Russo contended that in developing the concept of direct effect, the ECJ had recognised the concept of an individual right stemming from Community law which national courts had to protect -the ECJ had done this to maintain the uniformity and effectiveness of Community provisions. Such regard for uniformity had to lead the ECJ to define in outline the guarantees provided by Community law for situations arising within that law,

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<sup>106</sup> Four types of official prices for cereals are established: (i) a target price which represents the optimum level for domestic prices; (ii) a uniform intervention price representing the minimum market price at which intervention agencies are obliged to purchase; (iii) a threshold price is the minimum entry price for third-country imports: the price of imports is raised to the threshold price by a variable levy; (iv) these prices are interconnected in a system which established a common intervention price in feedgrains and provided a special reference (floor) price for wheat of breadmaking quality.

For further detail see Snyder, *Law of the Common Agricultural Policy* at 74-78 and at 98-111 (1985).

otherwise there would be little point in proclaiming the existence of interests protected by Community provisions if it were subsequently to be admitted that the consequences of any infringement varied from State to State. However Russo did concede that rules for effecting reparation must continue to fall within the competence of the national court.

The Commission, on the other hand, was much more prudent and was unwilling to be specific about the remedy in damages. It merely stated that - with regard to the extent a Community provision was intended to protect a particular individual's interest -<sup>107</sup>

...the principles of efficiency and of the uniform application of Community law require that this protection should be appropriate and effective, without prejudice to the neutral stance of Community law with regard to the procedure chosen.

Reischl AG, in his Opinion, first considered what would happen when *liability* had been alleged for damages arising out of provisions incompatible with Community law and stated:<sup>108</sup>

I believe that - as a general rule - this issue is one for the national courts which must, on the basis of the general obligations imposed upon Member States in Article 5 of the Treaty as regards their national legal order, draw the consequences flowing from their State's membership of the Community.

He then referred to *Commission v. Italy*<sup>109</sup> in which it was held that a judgment of the ECJ under EEC Arts 169 and 171 may be of substantive interest in establishing the liability that a Member State can incur as a result of its default as

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<sup>107</sup> Note 105 at 52.

<sup>108</sup> Note 105 at 62.

<sup>109</sup> Case 39/72 *Commission v. Italy* [1973] ECR 101.

regards *inter alia* private parties. He added that the idea expressed in *Commission v. Italy* stemmed logically from the principle that Community law was supreme and directly effective and that in order to avoid unequal treatment of individuals, it was necessary to work out such principles "upon which a uniform and as effective as possible a method of enforcing individual rights under Community law can be established."<sup>110</sup> Finally, Reischl AG concluded:<sup>111</sup>

The liability of a Member State for the consequences flowing from an infringement of Community law also arises out of the obligation to provide effective protection of these rights, provided that the other prerequisites under national law are present.

The ECJ held that the Community regulation in question<sup>112</sup> precluded a Member State from purchasing durum wheat on the world market and reselling it on the Community market at a price lower than the target price. In addition, it held that a producer might claim that he should not be prevented from obtaining a price approximating to the target price and in any event not lower than the intervention price. It concluded:<sup>113</sup>

It is for the national court to decide on the basis of the facts of each case whether an individual producer has suffered a damage. If such a damage has been caused through an infringement of Community law the State is liable to the injured party of the consequences in the context of the provisions of national law on the liability of the State.

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<sup>110</sup> Note 105 at 62.

<sup>111</sup> Note 105 at 63.

<sup>112</sup> EEC Reg 120/67.

<sup>113</sup> Note 105 at 56.

In their article<sup>114</sup> Green & Barav<sup>115</sup> have stated that the ECJ's judgment in *Russo v. AIMA* "remains the clearest authority for the proposition that national courts must award damages, within the framework of national procedural rules, to individuals harmed by a breach of a directly applicable provision of Community law."

They sought to develop and sustain their argument by suggesting that there was a right of individuals to receive, and a correlative duty of national courts to award, damages in cases where a breach of Community law had already been recorded by an ECJ judgment in proceedings brought under EEC Arts 169 and 171. In fact this has been recognised in two cases *Humblet*<sup>116</sup> and *Commission v. Italy*,<sup>117</sup> the latter having been cited and used by Reischl AG in *Russo v. AIMA*.

As regards *Humblet*, Green & Barav indicated that although decided under the ECSC Treaty, it was nevertheless relevant because (i) the ECJ itself referred to EEC Art 171 in order to determine the scope of its own jurisdiction, and (ii) ECSC Art 86 is in similar terms to EEC Art 5. In the judgment, the ECJ clearly stated:<sup>118</sup>

...if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind

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<sup>114</sup> Green & Barav, 'Damages in the National Courts for Breach of Community Law' (1986) 6 YEL 55.

<sup>115</sup> Green & Barav, *loc. cit.* at 63.

<sup>116</sup> Case 6/60 *Humblet v. Belgium* [1960] ECR 559.

<sup>117</sup> Case 39/72 *Commission v. Italy* [1973] ECR 101.

<sup>118</sup> Note 116 at 569.

the measure in question and to make reparation for any unlawful consequence which may have ensued.

Green & Barav proposed that the case thereby establishes the duty of Member States "to make reparation," i.e. pay compensation for any damage sustained as a result of a Community law violation recorded in an ECJ judgment. The right of private parties to damages as a result of the breach of Community law was referred to in several other judgments under EEC Art 169 including, *inter alia*, *Commission v. Italy* in which the ECJ held:<sup>119</sup>

...a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties.

An identical view in similar terms was expressed in two subsequent judgments in proceedings brought by the Commission against Italy.<sup>120</sup>

Although Green & Barav admitted that these cases concerned the question of admissibility of an action brought by the Commission after elimination of the breach by the State concerned, nevertheless they contended that the "linkage" of the appropriateness and worthiness of a judgment, and the possibility of involving the responsibility or liability of the State *vis-à-vis* private parties was extremely interesting.

Consequently, they argued, the combined effect of direct effectiveness and of a judgment delivered by the ECJ under EEC Art 171 in proceedings brought under EEC Art 169 must warrant

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<sup>119</sup> Note 117 at 112.

<sup>120</sup> Case 309/84 *Commission v. Italy* [1986] ECR 599; Case 103/84 *Commission v. Italy* [1986] ECR 1759.

a right of injured parties to damages and a concomitant duty on national courts to award them.

In his article,<sup>121</sup> Durand viewed *Russo v. AIMA* from a different angle. He took the ECJ's conclusion as his point of reference and states that when the ECJ referred to "the context of the provisions of national law on the liability of the State," it was not thereby authorising a system of national law to deny all liability of the State but rather placing the Community right *in the context* of such liability. Moreover it was quite conceivable that a State could break its obligations under Community law without causing loss to an individual which was recognised under Community law - this seemed to have been the case in *Russo v. AIMA*: Community law did not guarantee a particular level of profit but merely that the producer would obtain at least the intervention price. Since Russo had managed to obtain a price above the target price, there had been no breach of his rights under Community law. If, however, AIMA had caused the market price to fall below the target price, or conceivably only below the intervention price, Russo would have been entitled to damages provided he could prove the causal link.

Although there have been fewer ECJ decisions on the availability of damages for breach of directly effective EC law compared to its judgments concerning the right to restitution, nevertheless it is still possible to discern from the jurisprudence of the ECJ a right to compensatory relief for such a breach.

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<sup>121</sup> Durand, *loc. cit.* at 58-60.

As regards the liability of the Community for its own unlawful economic legislation, the ECJ has consistently held that a mere breach of the Treaty by the Council or the Commission does not, in itself, entail liability.<sup>122</sup> Only if a particular serious breach of a superior rule of law for the protection of the individual has occurred, will the Community incur liability. The acknowledgement of the liability of national public authorities for a mere breach of Community law while in similar circumstances the Community itself is not held to be liable accordingly results in a double standard.

Since the enforcement and protection of EC rights remains dependent largely on the use of national remedies, however, the right to damages would seem to be a more effective remedy for individuals in those Member States which have a well-developed system of public tort liability (e.g., France<sup>123</sup> and Italy<sup>124</sup>) than in Member States in which the extent of such liability is gradually emerging on a case-by-case basis (e.g., England<sup>125</sup>).

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<sup>122</sup> See e.g. Joined Cases 83 and 94/76, 4, 15 and 40/70 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v. Council and Commission* [1978] ECR 1209. For general reference, see Du Ban, 'Les principes généraux communs et la responsabilité non contractuelle de la Communauté' *Cah. dr. europ.* 1977.397; Couzinet, 'La faute dans le régime de la responsabilité non contractuelle des Communautés européennes' *R.T.D.E.* 1986.367.

<sup>123</sup> See *infra* at 167ff.

<sup>124</sup> See *infra* at 244ff.

<sup>125</sup> See *infra* at 84ff.



(9) INTERIM RELIEF TO ENFORCE COMMUNITY LAW

Apart from the availability of restitutionary and compensatory remedies for breach of EC law, it is submitted that the award of interim injunctive relief is an "appropriate measure" for the enforcement of rights deriving from EC law and that, in suitable cases, a party has a right to this remedy deriving, either partially or totally, from the breach of directly effective EC law.<sup>126</sup> In *Rewe v. Hauptzollamt Kiel*,<sup>127</sup> the ECJ stated:<sup>128</sup>

...[I]t must be remarked first of all that, although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. On the other hand, the system of legal protection established by the Treaty...implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.

National courts are required to afford the same degree of legal protection for breach of a Community right which is available for a similar action under domestic law, but the task of selecting the most appropriate of the available legal redresses is left to each Member State. Since the whole range

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<sup>126</sup> Case 34/67 *Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau* [1968] ECR 245 at 251; Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629 at 654, per Reischl, AG: "...[I]t is for the competent national courts to apply from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law."

<sup>127</sup> Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805.

<sup>128</sup> Note 127 at 1838.

of remedies must be available to a plaintiff suing for breach of EC law, actions for interim injunctive relief must in practice be permitted where national law provides for them.

Moreover, there seems to be a particular insistence,<sup>129</sup> in the case law of the ECJ, not only on the availability of judicial remedies in the national courts which are appropriate for securing an *effective* protection of enforceable Community rights<sup>130</sup> but also an *immediate* protection of such rights. In *Salgoil*,<sup>131</sup> for example, the ECJ stated<sup>132</sup> that the national courts are required -

to protect the interests of those persons subject to their jurisdiction who may be affected by any possible infringement [of the Treaty] by ensuring for them direct and immediate protection of their interests.

Immediate and effective protection necessarily implies that interim relief, in appropriate cases, should be made available.

At the Community level, a prohibitive remedy exists in respect of competition law in the form of a cease and desist order under art 3 of EEC Reg 17/62. As a result of the ECJ decision in *Camera Care*,<sup>133</sup> it is now accepted that the Commission has powers to grant interim relief albeit that EEC Reg 17/62 is silent on the matter. Injunctive remedies

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<sup>129</sup> Barav, 'Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant Interim Relief' 26 CML Rev (1989), 369 at 372-373.

<sup>130</sup> e.g. Case 222/86 *UNECTEF v. Georges Heylens* [1987] ECR 4097.

<sup>131</sup> Case 13/68 *SpA Salgoil v. Italian Ministry for Foreign Trade* [1968] ECR 453.

<sup>132</sup> Note 131 at 463.

<sup>133</sup> Case 792/79R *Camera Care Ltd v. Commission* [1980] ECR 119.

therefore exist for the enforcement of EEC Arts 85 and 86, i.e. the competition provisions of the EEC Treaty, both of which had been declared to be of direct effect.<sup>134</sup> Unlike the cases in which the plaintiff seeks, e.g. restitution of taxes illegally-levied by the national government in breach of EC law, the claim for breach of these EEC Articles will usually lie against another company and not against a Member State.

But in *Camera Care*, the ECJ made clear that the availability of interim relief at the Community level would be limited in nature:<sup>135</sup>

"[It] is essential that interim measures be taken only in cases proved to be urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption or which is intolerable in the public interest.

Furthermore, in relation to the exercise of such powers, the Commission itself has stated<sup>136</sup> that it would act only where there was a "reasonably strong *prima facie* case that there has been a violation of the rules of competition."

Accordingly, only where the exacting conditions laid down by the ECJ and elaborated upon by the Commission are proven to exist will it be feasible for private applicants to expect Commission action. It is therefore quite proper to say that interim relief at the Community level tends to be an exceptional remedy.

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<sup>134</sup> Case 127/73 *BRT v. SABAM* [1974] ECR 51 and Case 155/73 *Sacchi* [1974] ECR 409.

<sup>135</sup> Note 133 at 131.

<sup>136</sup> *Commission Statement on Interim Measures given to Camera Care and Hasselblad & etc. (Practice Note)* [1980] 1 CMLR 369.

Where the Commission does not grant interim measures, recourse must be had to the national courts before which the full range of interlocutory (and permanent) injunctive relief should be available to injured plaintiffs. In *Garden Cottage Foods in Milk Marketing Board*<sup>137</sup> for example, the Court of Appeal found that the defendants, by limiting their sales of bulk butter to four out of twenty distributors and by refusing to supply butter, had been guilty of an abuse of their dominant position. The plaintiffs were therefore entitled to an interim injunction restraining the defendants until the trial of the action or further order from, *inter alia*, withholding supplies of butter from the plaintiffs or otherwise refusing normal business relations contrary to EEC Art 86. In granting the injunction Lord Denning MR said:<sup>138</sup>

I think that the only effective remedy available in such a case as this is an injunction. The Common Market Commission have recently considered their own position about their ability to make interim orders. They said that they had power but they preferred it to be done by national courts.... Undoubtedly the national procedures here for obtaining an injunction are cheaper. The order is more easily policed here by way of seeing that the injunction is obeyed. In the circumstances, I think that there is a remedy by injunction available in our courts to restrain a breach of article 86 of the Treaty: especially as that article says that it 'shall be prohibited.'

On appeal, the House of Lords reversed the Court of Appeal's decision to grant an injunction by a majority of four to one.<sup>139</sup> The House held that if an infringement of EEC Art 86 were to give rise in English law to a course of action at

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<sup>137</sup> Court of Appeal [1982] QB 1114; House of Lords [1983] 2 AC 775. This case is more fully discussed *infra* at 00 and 00.

<sup>138</sup> [1982] QB at 1125.

<sup>139</sup> Lord Wilberforce dissenting.

the suit of an individual citizen who had suffered pecuniary loss by reason of the infringement, a remedy in damages would be available to compensate him for such loss. In dissenting, Lord Wilberforce favoured the granting of an injunction:<sup>140</sup>

Since Article 86 says that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct.

It is interesting to note, however, that the House of Lords did not cast any doubt on the principle that in an appropriate case the grant of an interlocutory injunction would be justified.

The potential utility of interim (and permanent) injunctions in other areas should not be ignored - in particular in relation to those EC provisions which also seek to promote free trade and competition within the common market, e.g. EEC Arts 30-34. These provisions prohibit, *inter alia*, quantitative restrictions on imports (EEC Art 30) or exports (EEC Art 34) or measures having equivalent effect and, like the competition provisions, have been declared to be of direct effect.<sup>141</sup> In such cases, the national court would not face the barrage of economic evidence that tends to accompany pure antitrust cases and hence the task of drafting a suitable form of words for an injunction would be much facilitated.<sup>142</sup> As these provisions are directed towards

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<sup>140</sup> [1983] 2 AC at 783.

<sup>141</sup> EEC Art 30: Case 74/76 *Ianelli v. Meroni* [1977] ECR 557; EEC Art 34: Case 83/78 *Pigs Marketing Board v. Redmond* [1978] ECR 2347.

<sup>142</sup> Green, 'The Treaty of Rome, National Courts, and English Common Law' *RabelsZ* 48 (1984) 509 at 536.

Member States, interim relief under EEC Arts 30-34 would be sought against the Member State concerned and not, as in the case of EEC Arts 85 and 86, against another company.

The availability of interim relief was the subject of proceedings brought before the ECJ. The case of *Commission v. United Kingdom*<sup>143</sup> was one of several challenging the restrictions placed on "non-British" fishing vessels by 1983 and 1986 fishing orders and the Merchant Shipping Act 1988.<sup>144</sup> The Commission brought an action pursuant to EEC Art 169 for a declaration that the UK, by imposing nationality requirements in the 1988 Act, had failed to fulfil its obligations under the EEC Treaty. In an ancillary action to the EEC Art 169 proceedings, the Commission requested a President's Order<sup>145</sup> to suspend the nationality requirements of the Act until judgment in the main proceedings. Those requirements had the effect of removing fishing licences from 31st March 1989 from Spanish nationals who, until that date, had fished under a British flag with a British fishing licence.

The President of the ECJ, in accordance with art 83(2) of the court's rules of procedure<sup>146</sup> ordered the UK to suspend

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<sup>143</sup> Case 279/89 *Commission v. United Kingdom*, *The Times* 28th October 1989.

<sup>144</sup> Two cases have already been decided: Case C3/87 *R v. Ministry of Agriculture, Fisheries & Food, ex parte Agegate Ltd* [1990] 3 WLR 226; and Case C216/87 *R v. Ministry of Agriculture, Fisheries & Food, ex parte Jaderow Ltd* [1990] 3 WLR 265.

<sup>145</sup> Any legal person who has brought an action before the ECJ can request interim measures: see note 146 *infra*.

<sup>146</sup> Interim measures may be ordered where there are circumstances giving rise to urgency and the factual and legal grounds establish a *prima facie* case for the measures applied

the nationality requirements as requested by the Commission.<sup>147</sup>

In collateral national proceedings, *R v. Transport Secretary, ex parte Factortame Ltd*,<sup>148</sup> the House of Lords requested a preliminary ruling on the extent to which national courts were empowered to grant interim relief where rights claimed under EC law were at issue.

The ECJ, in its judgment,<sup>149</sup> stated that in accordance with its previous case law<sup>150</sup> it was for the national courts, in application of the principle of co-operation laid down in EEC Art 5, to ensure the legal protection which persons derived from the direct effect of the provisions of Community law. It continued further:<sup>151</sup>

The full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.

It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

In order to ensure that individuals vested with EC rights are adequately protected, the ECJ expressly empowered national courts to grant, in appropriate circumstances, interim relief

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for.

<sup>147</sup> Note 146 *ibid*.

<sup>148</sup> [1984] 2 WLR 997.

<sup>149</sup> Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd*, *The Times* 20th June 1990.

<sup>150</sup> See *supra* at 4ff. The ECJ quoted a passage from its judgment in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629 at 644.

<sup>151</sup> Note 144 *ibid*.

including an order to disapply temporarily a national measure alleged to contravene the EEC Treaty.

Interim injunctive relief may now be sought by litigants in national courts to protect their (putative) EC rights whether such rights arise under the competition provisions (EEC Arts 85 and 86), the free movement of goods provisions (EEC Arts 30-34) or the various provisions which seek to guarantee freedom from discrimination on the grounds of nationality (EEC Arts 48, 52 etc.). The judgment in *Factortame* has thus broadened the scope of remedies available for the direct and immediate protection of EC nationals.

The availability of interim injunctive relief to prevent loss resulting from infringements of EEC Treaty Articles has been discussed, *inter alios*, by Steiner, Temple Lang and Barav.

Steiner, in her article,<sup>152</sup> contends<sup>153</sup> that the main problem is one of categorisation for when deciding what is a "similar action of a domestic nature"<sup>154</sup> EC law, being *sui generis*, cuts across the traditional legal boundaries between public law and private law rights and remedies. Her article discusses at length domestic UK remedies for breach of EC law<sup>155</sup> but in relation, *inter alia*, to the injunction she states:<sup>156</sup>

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<sup>152</sup> Steiner, 'How to Make the Action Suit the Case: Domestic Remedies for Breach of EEC Law' (1987) 12 EL Rev 102.

<sup>153</sup> Steiner, *loc. cit.* at 103.

<sup>154</sup> Steiner, *loc. cit.* at 103-104.

<sup>155</sup> Further reference to this article, see *infra* at 94ff.

<sup>156</sup> Steiner, *loc. cit.* at 121.



The 'normal' remedy' for breaches of EEC goods and competition provisions will be the declaration or the injunction. The right freely to pursue an economic activity, or, alternatively, the right to invoke the protection of directly effective EEC law, should be sufficient to satisfy the locus standi requirements of both these remedies, whether in a private or, a fortiori, a public law action. Since a declaration is a non coercive remedy, an injunction should always be available to guarantee the minimum effective protection of the individual's community rights.

Temple Lang in his article<sup>157</sup> briefly discusses the types of remedies available in the national courts of the United Kingdom and the Republic of Ireland. Then he considers at more length the decision of the House of Lords in *Garden Cottage Foods*, concluding:<sup>158</sup>

To sum up therefore, a majority of the House of Lords has declared that it is not 'seriously arguable' that there is no right to damages for breach of Article 86, and a unanimous Court of Appeal has awarded an injunction. There is nothing in the reasoning of either court to limit the conclusions to Article 86, or to the United Kingdom. In spite of the procedural complexities of the case, one may reasonably conclude that the national courts of EEC member states may award both compensation and injunction in appropriate cases for breaches of Articles 85, 86 and 90.

He follows with a comparison of the present situations in certain other Member States including a discussion, *inter alia*, on certain Belgian and Dutch cases.<sup>159</sup> Temple Lang then considers the attitude of the European Commission to the availability of national claims for breach of EC antitrust laws; he observes that a number of cases before the ECJ in

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<sup>157</sup> Temple Lang, 'EEC Competition Actions in Member States' Courts,' in Hawk (ed), *Antitrust and Trade Policies of the European Economic Community*, 1983 Ford Corp L Inst 219.

<sup>158</sup> Temple Lang, *loc. cit.* at 229.

<sup>159</sup> Temple Lang, *loc. cit.* at 231-232; for a further comparative study of remedies available for breach of the EC competition provisions, see Picañol, 'Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review' 1983/2 LIEI 1.

which the question has arisen incidentally, the Commission has submitted that individuals and firms may claim, *inter alia*, injunctions in national courts for infringements of EEC Arts 85 and 86. For example, in the statement submitted in the *Camera Care* proceedings, the Commission stated:<sup>160</sup>

In general, parties should consider whether a similar remedy may not be available from a national court before applying to the Commission - particularly if the national procedures are cheaper or the order more easily policed.

This, he states, is a general statement of the policy which the Commission intended to adopt in exercising its powers to order interim measures, that it clearly implies the Commission believes plaintiffs to have remedies in national courts and that in each case the circumstances must be examined to see if a national court can give a satisfactory remedy.

Finally, Barav has considered the availability of interim relief subsequent to the *Factortame* case.<sup>161</sup> He stresses<sup>162</sup> that the immediate consequence of the decision is to vest national courts with the jurisdiction to order temporary disapplication of any provision of national law whether it is primary or delegated legislation or a *fortiori* administrative regulations alleged to violate EC law.

Since the ECJ has not specified the circumstances in which the power to grant relief should be exercised, the task has

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<sup>160</sup> Kerse, *EEC Antitrust Procedure* 2nd ed. at 382-383 (1987): cited by Lord Denning MR in *Garden Cottage Foods v. Milk Marketing Board* [1982] QB 1114 at 1125.

<sup>161</sup> Barav, 'Interim relief and English courts' (1990) 140 New LJ 896.

<sup>162</sup> Barav, *loc. cit.* at 899.

been left to the national courts to resolve. Such a task is subject to the overriding consideration that the conditions which must be satisfied should not render the right to obtain interim relief "virtually impossible."<sup>163</sup> He adds that the availability of adequate damages would be a relevant consideration in deciding whether or not to give interim protection.<sup>164</sup>

Furthermore, he continues, the ECJ judgment does not prejudge the issue of which type of interlocutory relief may be granted:<sup>165</sup>

The crucial point is that the impugned Act should not be applied pending the conclusive determination of the question of its compatibility with Community law.

Barav concludes by pointing out the inconsistency which allows an applicant to claim interim relief in relation to a violation of EC law by a statute but provides him with no such relief where there is no connection with EC law. This inconsistency, he suggests, might have the effect of ameliorating the system of judicial protection in a purely domestic context by making Member States provide interim relief in all such cases.<sup>166</sup>

There is no doubt that interim injunctive relief is a useful and effective means of preventing infringements by public authorities of the rights of individuals, which derive from EC law. The ECJ formerly limited the right to such a

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<sup>163</sup> Case 199/82 *San Giorgio* [1983] ECR 3595 at 3612.

<sup>164</sup> For example, at present there is no right at all in English law to damages for loss sustained as a result of the application of an Act of Parliament.

<sup>165</sup> Barav, *loc. cit.* at 899.

<sup>166</sup> Barav, *loc. cit.* at 899.

remedy, however, to cases in which the individual would have been entitled to an injunction or equivalent relief in a domestic context.

In England, this had meant that injunctions for breach of EC law could only be sought against a regulatory agency or against any private enterprise but not against the Crown or one of its Ministers;<sup>167</sup> in France, administrative judges could not award injunctions but might, exceptionally, grant interim relief against the administration;<sup>168</sup> and in Italy, injunctions as such do not exist and urgent interim relief is not obtainable against the public authorities.<sup>169</sup>

This former position has been altered by the *Factortame* case<sup>170</sup> which provides the most conclusive affirmation to date of the scope of the effectiveness principle because the ECJ, for the first time, has *explicitly* required a Member State to change its domestic law in order to comply with this general principle of Community law.

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<sup>167</sup> See *infra* at 69ff.

<sup>168</sup> See *infra* at 163ff.

<sup>169</sup> See *infra* at 242-243.

<sup>170</sup> Case C-213/89, *The Times* 20th June 1990.

## CHAPTER TWO

### REMEDIES FOR BREACH OF EC LAW BY PUBLIC AUTHORITIES:

#### ENGLAND

##### (1) INTRODUCTION

##### (a) The relationship of UK law and EC law

Parliament passed the European Communities Act 1972 in order to make provision for the United Kingdom's membership of the Community. The Act made EC law applicable in the national legal system since without it the Community Treaties and Community legislation would have had no effect internally.<sup>1</sup> The European Communities Act is not therefore merely the means by which Parliament gave assent to the Treaties, it also provides the legal foundation from which the direct effect of Community law derives its status in the United Kingdom.

Section 2(1) of the Act provides for the direct effectiveness of EC law in the United Kingdom:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

This subsection makes provision for the direct effect of both the Community Treaties<sup>2</sup> and Community legislation.<sup>3</sup> Moreover,

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<sup>1</sup> See *McWhirter v. Attorney-General* [1972] CMLR 882 at 886, per Lord Denning MR.

<sup>2</sup> As defined in the 1972 Act, s1(2).

it includes future Community law<sup>4</sup> and makes it clear that Community law determines whether a particular provision is of direct effect.<sup>5</sup>

Section 2(4) is the subsection relevant to the question of supremacy although it does not expressly say that EC law is supreme. It provides:

... Any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provision of this section....

There is no doubt that the provisions in s2(1) and s2(4) are effective as regards UK legislation passed before the European Communities Act. The real problem concerns those statutes passed *after* the Act: although it is true to say that under s2(4), these too are subject to EC law, the principle of parliamentary sovereignty intrudes at this point and limits the provision's effectiveness. As a fundamental principle of the unwritten British constitution, the doctrine of parliamentary sovereignty states that there are no legal limits to the legislative power of the UK Parliament except in so far that Parliament cannot limit its own powers for the future.<sup>6</sup>

If it were intended to deprive Parliament of the power to pass legislation which would override EC law, s2(4) would be ineffective. This is not the case, however, as s2(4) lays

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<sup>3</sup> "rights... created or arising... under the Treaties."

<sup>4</sup> "from time to time created."

<sup>5</sup> "as in accordance with the Treaties are without further enactment to be given legal effect."

<sup>6</sup> See Wade & Bradley, *Constitutional and Administrative Law* 10th ed. at 72-75 and at 81-82 (1985).

down a very strong rule of construction that Parliament is to be presumed not to intend any future statute to override Community law. In consequence, Community law will always prevail unless Parliament clearly and expressly states, in a future Act, that it is to override EC law. As Lord Denning MR stated in *Macarthys Ltd v. Smith*:<sup>7</sup>

If the time should come when our Parliament deliberately passes an Act - with the intention of repudiating the Treaty or any provision in it - or intentionally of acting inconsistently with it - and says so in express terms - then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.

In fact in that case, while Cumming-Bruce and Lawton LJ were prepared to give EC law "priority" on the basis of s2(4), Lord Denning MR used that subsection as a rule of construction and construed the Equal Pay Act 1970, s1 to conform with EEC Art 119 which enunciates the principle of equal pay for equal work. His view of "construction," though, was broader than is usually taken in construing international treaties. He stated:<sup>8</sup>

In construing our statute, we are entitled to look to the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient - or is inconsistent with Community law - by some oversight of our draftsmen - then it is our bounden duty to give priority to Community law. Such is the result of section 2(1) and (4) of the European Communities Act 1972.

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<sup>7</sup> [1979] ICR 785 at 789.

<sup>8</sup> Note 7 *ibid.* On the use of treaties as aids to interpretation of English statutes, see Harris, *Cases & Materials on International Law* 3rd ed. at 68-75 (1983); Brownlie, *Principles of Public International Law* 3rd ed. at 623-630 (1979).

In *Garland v British Rail Engr Ltd*,<sup>9</sup> the House of Lords adopted this "rule of construction" approach to s2(4). The case before the House involved a conflict between EEC Art 119 and the Sex Discrimination Act 1975, s6(4) of which exempted from the equal pay principle provisions relating to death and retirement. The House held<sup>10</sup> that s6(4) of the 1975 Act ought so far as possible to be construed so as to carry out the obligations of and not to be inconsistent with the EEC Treaty. However, it was possible<sup>11</sup> to construe the 1975 Act to conform with EC law "without any undue straining of the ordinary meaning of the language used...."

The House of Lords appears to have opted for the "rule of construction" approach to the European Communities Act 1972, s2(4) by advocating a more generous approach to "construction," thereby seeking to accommodate the principle of supremacy of EC law with traditional notions of sovereignty in the United Kingdom.

In contrast to the "European" view is the decision of the House in *Duke v. GEC Reliance Ltd*,<sup>12</sup> where it was decided that s6(4) of the Sex Discrimination Act 1975 was not capable of being construed to conform with the Equal Treatment Directive, EEC Dir 76/207, as interpreted by the ECJ. Lord Templeman,

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<sup>9</sup> [1983] 2 AC 751.

<sup>10</sup> Note 9 at 771 per Lord Diplock.

<sup>11</sup> Note 9 at 771.

<sup>12</sup> [1988] AC 618. See also *Pickstone v. Freeman's Publishing PLC* [1989] AC 66. Both cases are discussed in Greenwood, 'European Community Law: Relationship of Community Law and English Law' [1988] *All ER Annual Review* 122.



delivering the opinion of the House stated:<sup>13</sup>

Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable.

Despite this Opinion, the most recent case, *R v. Transport Secretary, ex parte Factortame Ltd*,<sup>14</sup> confirms the view that UK courts will be prepared to concede supremacy to Community law provided they regard it as directly effective. The decision marked the first unequivocal acceptance by the House of Lords of the supremacy of directly effective EC provisions over unambiguous conflicting provisions of a subsequent UK statute. Lord Bridge, delivering the opinion of the House of Lords, treated EC law and national law as separate systems where no issue of the validity, as opposed to the effectiveness of domestic legislation arose. This dualist view of EC law is consistent with the orthodox theory of parliamentary sovereignty. Lord Bridge accepted that -<sup>15</sup>

By virtue of section 2(4) of the [European Communities Act 1972] Part II of [the Merchant Shipping Act 1988] is to be construed and take effect subject to directly enforceable Community rights and those rights are, by section 2(1) of the Act of 1972, to be 'recognised and available in law, and ... enforced, allowed and followed accordingly; ...' This had precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC. Thus it is common ground that in so far as the applicants succeed before the

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<sup>13</sup> Note 12 at 639-640.

<sup>14</sup> [1989] 2 WLR 997.

<sup>15</sup> Note 14 at 1011.

[European Court of Justice] in obtaining a ruling in support of the Community rights which they claim, those rights will prevail over the restrictions imposed on registration of British fishing vessels by Part II of the Act of 1988 and the Divisional Court will, in the final determination of the application for judicial review, be obliged to make appropriate declarations to give effect to those rights.

The House of Lords has thus clarified the effect of the European Communities Act 1972, s2. The phrase "directly enforceable Community rights" is used to refer to "those rights in Community law which have direct effect in the national law of member states of the EEC."<sup>16</sup> It would therefore seem that the unambiguous provisions of a UK statute passed after the 1972 Act had to give way only to directly effective Community law.

Following a reference by the House of Lords, the ECJ ruled, however, that <sup>-17</sup>

[t]he full effectiveness of Community law would be ... impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

The immediate consequence of the ECJ's ruling<sup>18</sup> was to vest the English courts with jurisdiction to order the temporary disapplication of any provision of national law, be it of primary or delegated legislation and, *a fortiori*, administrative regulations alleged to violate EC law.

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<sup>16</sup> Note 14 at 1006.

<sup>17</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>18</sup> As noted by Barav, 'Interim relief and English courts' (1990) 140 New LJ 896 at 899.

Consequently, national courts are bound to protect the *putative* rights of individuals deriving from EC law pending final determination of the issue, even if this amounts to granting an individual the *locus standi* to seek suspension of a lawfully-enacted statute where the Act of Parliament *might* conflict with a Community norm.<sup>19</sup>

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<sup>19</sup> Shortly after the ECJ delivered its judgment, the House of Lords granted an injunction to suspend the discriminatory provisions of the Merchant Shipping Act 1988: see *The Independent* 12th July 1990.

(b) Remedies in English law

This part outlines the various judicial remedies which may be sought by private persons to enforce their EC rights against public authorities in England.<sup>20</sup> The remedies employed belong to two main groups, viz.:

(i) Private law remedies - such as restitution, injunctions and damages;<sup>21</sup> and

(ii) Public law remedies - principally certiorari, prohibition and mandamus, collectively known as the prerogative orders or remedies.<sup>22</sup>

Until recently, each group had its own distinct procedure so that a litigant was unable to seek a public law remedy and, in the alternative, a private law remedy in the same procedure. It is intended, therefore, to deal first with the ordinary private law remedies and, secondly, to discuss the prerogative orders and the effect on these groups of the recently introduced application for judicial review procedure.

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<sup>20</sup> The system of administrative law in Scotland is somewhat different, see generally Bradley, *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 1, s.v. *Administrative Law* (1987).

<sup>21</sup> Declarations do not form part of the present study and will be mentioned only in passing: see generally Wade, *Administrative Law* 6th ed. at 593-603 (1988).

<sup>22</sup> Recourse to the Ombudsman and to administrative tribunals constitute remedies for breaches of EC law, they do not form part of this study and will not be discussed: see generally Wade, *op. cit.* at 79-102 and at 894-954.

## (2) RESTITUTION

### (a) Introduction

Distinct from the action for damages is the claim in restitution<sup>23</sup> for the recovery of sums paid to a public authority which may have demanded them by imposing a tax or rate which later turns out to be *ultra vires* and consequently illegal. Since there are no special rules governing public authorities, the question of restitution has to be treated as a matter of ordinary law which governs private transactions. Under English law, the primary rule is that while money paid under a mistake of fact may be recovered,<sup>24</sup> money paid under a mistake of law may not.<sup>25</sup>

### (b) Recovery of Money Paid under a Mistake of Fact

In *Aiken v. Short*,<sup>26</sup> Bramwell B stated:<sup>27</sup>

In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

Consequently, it was considered for many years that a person could recover money paid under a mistake of fact only if he

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<sup>23</sup> See generally, Birks *Introduction to the Law of Restitution* at 9-27 (1985); Goff & Jones *The Law of Restitution*, 3rd ed. at 3-59 (1986).

<sup>24</sup> *Aiken v. Short* (1856) 1 H & N 210; 156 ER 1180.

<sup>25</sup> *Bilbie v. Lumley* (1802) 2 East 469; 102 ER 448; Goff & Jones, *op. cit.* at 117.

<sup>26</sup> Note 24 *ibid.*

<sup>27</sup> Note 24 at 215; *ibid.* at 1182.

mistakenly thought that he was liable to pay.<sup>28</sup> However, more recent authorities have rejected this proposition<sup>29</sup> and enunciated a simple principle, in the words of Robert Goff J<sup>30</sup> that -

... if a person pays money to another under a mistake of fact which caused him to make the payment he is prima facie entitled to recover it as money paid under a mistake of fact.

In the great majority of cases where restitution has been granted, it is the payer's mistake which led him to believe that he was under a present liability to the defendant to pay the money.<sup>31</sup> This was established by *Kelly v. Solari*<sup>32</sup> in which the directors of an insurance company paid to the defendant, the executrix of the assured, money under an insurance policy on the life of the assured, recently deceased. They paid the money forgetting the fact that the policy had lapsed because of non-payment of premiums by the assured. The Court of Exchequer held that the money could be recovered in an action for money had and received. The principle was stated by Parke B:<sup>33</sup>

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<sup>28</sup> see e.g. *Kelly v. Solari* (1841) 9 M & W 54 at 58 per Parke B; *Deutsche Bank v. Beriro & Co Ltd* (1895) 1 Com Cas 255 at 259 per Lindley LJ; *Re Bodega Co* [1904] 1 Ch 276.

<sup>29</sup> *Kleinwort Sons & Co v. Dunlop Rubber Co* (1907) 97 LT 263; *Kerrison v. Glyn, Mills, Currie & Co* (1911) 81 LJKB 465; *RE Jones Ltd v. Waring & Gillow Ltd* [1926] AC 870; *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84.

<sup>30</sup> *Barclays Bank Ltd v. WJ Simms Ltd* [1980] QB 677 at 695.

<sup>31</sup> Other cases in which recovery was allowed where the payer's mistake was not of this character are dealt with in Goff & Jones, *op. cit.* at 92-100.

<sup>32</sup> (1841) 9 M & W 54; 152 ER 24.

<sup>33</sup> Note 32 at 58; *ibid.* at 26.

I think that where money is paid to another under the influence of a mistake, that is, under the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it ....

This, and other cases,<sup>34</sup> have established that in order to succeed, it is necessary for the plaintiff to indicate a specific fact as to which he was mistaken.

(c) Recovery of Money paid under a Mistake of Law

The decision of Lord Ellenborough in *Bilbie v. Lumley*<sup>35</sup> is said to have established the principle that all payments made under a mistake of law are irrecoverable<sup>36</sup> and this appears to be the case even where it is paid to a government department on its own view of the law.<sup>37</sup> Moreover, to believe that a government act is valid, when in reality it is null, is a mistake of law and money paid pursuant to that act is *prima facie* irrecoverable as having been paid under mistake of law.

For example, in *William Whiteley Ltd v. R*,<sup>38</sup> recovery was denied under this principle where money was paid in

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<sup>34</sup> e.g. *Norwich Union Fire Insurance Soc Ltd v. WH Price Ltd* [1934] AC 455; *Baylis v. Bishop of London* [1913] 1 Ch 127.

<sup>35</sup> (1802) 2 East 469; 102 ER 448.

<sup>36</sup> Various commentators have sought to limit this broad proposition. Goff & Jones suggest (*op.cit.* at 119) that the *Bilbie v. Lumley* principle should only preclude recovery of money which was paid in settlement of an *honest* claim. Any other payment made under a mistake of law should be recoverable if it would have been recoverable had the mistake been one of fact: see *Hydro-Electric Commission of Nepean v. Ontario Hydro* (1982) 132 DLR (3d) 193 at 206-207 per Dickson J dissenting.

<sup>37</sup> *National Pari-Mutuel Association Ltd v. R* (1930) 47 TLR 110.

<sup>38</sup> (1909) 101 LT 741.

consequence of the mistaken construction of a statute. In that case servants were employed to serve meals at the plaintiff's canteen. The revenue claimed that, since under the Revenue Act 1869 licences were required for "male servants," it was necessary for the plaintiff to have licences for its canteen workers. Although the plaintiff protested, it took out and paid for its licences. However, when it later successfully challenged the Revenue's interpretation of the Act, it brought proceedings seeking recovery of the moneys paid to the Revenue for the licences. The High Court (Walter J) dismissed the claim. It considered that the payments were voluntary and since there was no evidence of duress, compulsion or demand *colore officii*, the plaintiff could not therefore recover the money: it knew all the facts and could have resisted the claim.

Similarly, the Court of Appeal in *National Pari-Mutuel Assn Ltd v. R*<sup>39</sup> held that the applicant company could not recover betting duty mistakenly paid as a result of their misconstruction of the Finance Act 1926 since their payment was voluntary.<sup>40</sup>

The English courts have therefore sought to modify this basic rule and two exceptions have been developed:

The first is to represent mistakes of law as mistakes of fact. Indeed in cases where equitable relief has been sought,

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<sup>39</sup> Note 37 *ibid*.

<sup>40</sup> Nowadays, overpayments of tax under a mistake of law may be recoverable where the taxpayer has been charged under an assessment which was excessive by reason of some error or mistake in the return or statement made by him for the purposes of the assessment: Taxes Management Act 1970, s33(1). But see *infra* at 67.



an unreal distinction has been drawn between a mistake of "general law" and a mistake as to "private rights" which is characterised as a mistake of fact.<sup>41</sup>

The second is to use the doctrine of duress, which holds that the payment does not count as voluntary, and is therefore recoverable, if it in fact has to be made to secure the performance of some duty or service due to or sought by the payer.<sup>42</sup> In *Kirri Cotton Co Ltd v. Dewani*,<sup>43</sup> the Privy Council carried this doctrine to the point of protecting the payer where he was not on equal terms or not equally to blame (*in pari delicto*) with the recipient for any reason, such as where the latter declined to grant him a lease unless he paid him an unlawful premium. On the other hand, the mere threat to sue for the payment is not duress nor, as has already been stated, does it help the payer if he pays under protest.<sup>44</sup>

(d) Restitution of sums levied in breach of EC law

It is interesting to speculate, however, upon the position in English law where the plaintiff in a restitution action has only paid over the sum in dispute following arguments with the relevant authority.<sup>45</sup> This was the case in

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<sup>41</sup> *Cooper v. Phibbs* (1867) LR 2 HL 149; Goff & Jones, *op. cit.* at 124.

<sup>42</sup> e.g. the return of property, *Irving v. Wilson* (1791) 4 Term Rep 485; or the grant of a licence or permission, *Morgan v. Palmer* (1824) 2 B & C 729; *Eadie v. Township of Brantford* (1967) 63 DLR (2d) 561.

<sup>43</sup> [1960] AC 192.

<sup>44</sup> *William Whiteley Ltd v. McGregor* (1904) 101 LT 741.

<sup>45</sup> Green, 'The Treaty of Rome, National Courts and English Common Law: The Enforcement of European Competition Law After Milk Marketing Board' *RabelsZ* 48 (1984) 509 at 540-541.

the *Hans Just*<sup>46</sup> discussed earlier<sup>47</sup> in which the plaintiff after having originally refused to pay the tax only acceded to the tax authorities' demands when they threatened to collect the tax by distress and strike the plaintiff firm off the customs authorities' register. It could be argued that having thereby brought the unlawful nature of the tax to the authorities' attention, the latter proceeded to demand payment not on the basis of error of law but of error of fact.

There are very few reported cases in English law, however, where public authorities have been forced to repay sums unlawfully collected. Wade<sup>48</sup> ascribes this to the fact that -

..public authorities are often willing to make restitution voluntarily when they have acted unlawfully, as witness the case of the television licences where the Home Office mounted on elaborate operation to repay all the surcharges which they had wrongly levied."

Nonetheless, it has been stated<sup>49</sup> that a voluntary solution is no surrogate for a mandatory one.

Statutory remedies provide mixed relief. In the area of import duties, the Custom and Excise Management Act 1979, s127 provides:<sup>50</sup>

127.-(1) If, before the delivery of any imported

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<sup>46</sup> Case 68/79 *Hans Just A/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 501.

<sup>47</sup> See *supra* at 23.

<sup>48</sup> Wade, *op. cit.* at 791. In support of the following statement, he cites *Congreve v. Home Office* [1976] QB 629. In that case, the Home Office had issued many thousands of demands and had to mount a great exercise to repay all the sums unlawfully collected.

<sup>49</sup> Green, *loc. cit.* at 540.

<sup>50</sup> Customs and Excise Management Act 1979 (c2).

goods out of charge, any dispute arises as to whether any or what duty is payable on those goods, the importer shall pay the amount demanded by the proper officer but may, not later than 3 months after the date of the payment-

(a) if the dispute is in relation to the value of the goods, require the question to be referred to the arbitration of a referee appointed by the Lord Chancellor (not being an official of any government department), whose decision shall be final and conclusive; or

(b) in any other case, apply to the High Court ... for a declaration as to the amount of duty, if any, properly payable on the goods.

(2) If on any such reference or application the referee or court determines that a lesser or no amount was properly payable in respect of duty on the goods, the amount overpaid shall be repaid by the Commissioners, together with interest thereon from the date of the overpayment at such rate as the referee or court may determine....

The authorities are accordingly legally bound to repay sums wrongfully collected on the importation of goods with interest thereon, although this remedy is subject to a short limitation period of three months. Under this provision, charges levied contrary to the EEC Treaty provisions on customs duties and measures having equivalent effect, *i.e.* EEC Arts 12-13, may be recovered by importers.

Claims for the restitution of taxes levied in breach of EEC Art 95 face greater procedural difficulties. At first sight s33(1) of the Taxes Management Act 1970<sup>51</sup> appears to be accommodating:

If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment in which the assessment was made, make a claim to the Board for relief.

This subsection is limited, however, by the fact that relief

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<sup>51</sup> Taxes Management Act 1970 (c9).

is available only in respect of "some error or mistake in a return," i.e. only factual errors may form the basis of a remedy - legal error on the part of the collecting authority may not be rectified. Such an interpretation is supported by s33(2), the second paragraph of which states:

Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made.

In addition, s33(4) amounts to an effective denial of appeal by the aggrieved taxpayer to the ordinary courts. As previously observed,<sup>52</sup> these rules are restrictive indeed and there are strong reasons for believing that, since they effectively deny the existence of a repayment remedy for taxes levied contrary to EEC Art 95,<sup>53</sup> there would be justifiable grounds for arguing that they were contrary to EEC law.<sup>54</sup>

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<sup>52</sup> Green, *loc. cit.* at 541.

<sup>53</sup> Such a tax being levied in accordance with prevalent Revenue practice, albeit wrong and unlawful Revenue practice.

<sup>54</sup> See *supra* at 18ff.

(3) INTERIM RELIEF

(a) Introduction

The availability of adequate relief in relation to the period prior to the delivery of a final judgment is an important matter for discussion.

In England, the main form interim relief takes is that of the interlocutory or interim injunction,<sup>55</sup> which has been the subject of the most recent developments in the field of EC law.<sup>56</sup>

(b) Injunction

(i) Definition

The injunction is the standard remedy of private law for requiring the party to whom it is addressed to refrain from doing or, occasionally, as a mandatory injunction to do, a particular act. It is discretionary in character and may be used against a public body to restrain a wrongful act, e.g. a tort or breach of contract, or to prevent an *ultra vires* act. Under the Crown Proceedings Act 1947, s21, injunctions could not be awarded against the Crown or against its ministers in civil proceedings:

(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that: -

(a) where in any proceedings against the Crown any such relief as might in

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<sup>55</sup> Other forms of interim relief include, *inter alia*, a stay of proceedings: see *R v. Education & Science Secretary, ex parte Avon CC*, *The Times* 29th May 1990.

<sup>56</sup> For a full discussion of this point, see *infra* at 79.

proceedings between subjects be  
granted by way of injunction ... the  
court shall not grant an injunction

....

(2) The court shall not in any civil proceedings grant any injunction ... against an officer of the Crown if the effect of granting the injunction ... would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

Subject to these mainly formal differences in the case of the Crown,<sup>57</sup> injunctions are as readily available against public authorities as they are against private persons<sup>58</sup> and they are often granted to prohibit wrongful or unlawful action. Since prevention is usually better than cure, a perpetual injunction or an interim injunction will be awarded to restrain a threatened wrong before it has taken place. The injunction itself is specific with the result that a final injunction ends the wrong instead of simply assessing it in money. This remedy, therefore, provides the means both of testing the legal validity of some act which still lies in the future and also of preventing the continuance of some wrong which has already begun.

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<sup>57</sup> It should be noted that while s21(1)(a) prohibits the grant of an injunction against the Crown itself in any proceedings, s21(2) only prohibits the grant of an injunction against an officer of the Crown in civil proceedings. This expression was thought not to include an application for judicial review: see *R v. Home Secretary, ex parte Herbage (No 1)* [1987] QB 872 per Hodgson J; and the Court of Appeal in *R v. Licensing Authority, ex parte Smith, Klein & French Laboratories (No 2)* [1989] 2 WLR 378. However this view was overturned as erroneous by the House of Lords in *R v. Transport Secretary, ex parte Factortame Ltd* [1989] 2 WLR 997. See Smythe, 'Injunctions against ministers - the right answer to the wrong question' (1989) 139 New LJ 1236. But now see *infra* at 79.

<sup>58</sup> Supreme Court Act 1981, ss 30 and 31 and County Courts Act 1984, s22.

(ii) Interlocutory injunction

In an action for an injunction, the plaintiff may apply for an interlocutory (or interim) injunction, the purpose of which is to maintain the status quo until the trial of the action. If it is granted, the plaintiff may be required to give an undertaking to indemnify the defendant for any loss he suffers as a result of the grant of the interim order should it turn out at the trial there was no case for an injunction.

The House of Lords, in *American Cyanamid Co v. Ethicon Ltd*<sup>59</sup> explained the principles which were to be followed by the court in determining whether to grant such an injunction. The court must first be satisfied that the claim is not frivolous or vexatious, i.e. that there is a serious case to be tried : if the material then before the court shows that the plaintiff has a "real prospect of succeeding in his claim for a permanent injunction at the trial," the injunction may be granted. However, if the material does not go so far the court will consider whether the balance of convenience lies in favour of granting or refusing the relief sought - if it seems likely that should the plaintiff succeed, damages would adequately compensate him, the injunction will not be granted. But if there is a doubt as to the adequacy of damages all the relevant factors will have to be considered and where they appear to be evenly balanced, the counsel of prudence is to do what is necessary to maintain the status quo.<sup>60</sup>

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<sup>59</sup> [1975] AC 396.

<sup>60</sup> Applying these principles an interlocutory injunction was refused in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130.

(iii) Mandatory injunction

Whereas the prohibitory (or restrictive) injunction is a negative order requiring someone to refrain from doing some particular act, the mandatory injunction is a positive order requiring a person to perform a particular act. Special considerations do apply, however, to mandatory injunctions which the courts are more reluctant to grant.<sup>61</sup> By granting a prohibitory injunction, the court merely prevents the future continuance or repetition of the conduct of which the plaintiff complains. On the other hand, a mandatory injunction, in cases where the alleged wrongdoing has already begun, may mean undoing what has already been done and this process may involve the defendant in substantial expenses and inconvenience. If the mandatory order would inflict damage on the defendant out of all proportion to the relief which the plaintiff ought to obtain, the court will refuse it.<sup>62</sup>

A mandatory injunction may also be sought where no damage has yet occurred. Such orders may not involve the undoing of what has already been done but may still be troublesome and costly for the defendant.

(iv) *Locus standi*

Any person whose own legal rights are under threat from a public authority naturally has the *locus standi* to seek an

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<sup>61</sup> Wade, *op. cit.* at 585: "There may also be more scope for mandatory injunctions now that there is a dichotomy between public and private law with some duties assigned to the latter category."

<sup>62</sup> *Sharp v. Harrison* [1922] 1 Ch 502.



injunction in an action begun by writ or originating summons.<sup>63</sup> In *Boyce v. Paddington BC*<sup>64</sup> Buckley J, in an oft-quoted passage from his judgment, outlined the situations for which the plaintiff would have the standing to sue:<sup>65</sup>

... A plaintiff can sue without the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right....

In other cases, however, it has been held that only the Attorney-General, as the nominal plaintiff in a relator action, could vindicate a public right.<sup>66</sup> If, for example, a public authority passed some *ultra vires* act such as illegal local government expenditure, only the Attorney-General could apply for an injunction.<sup>67</sup>

Despite the courts' tendency to take into account the many situations where a person has a special interest without any specific legal right, and to grant injunctions on the

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<sup>63</sup> As a result of RSC Ord 53, an injunction may be obtained in an application for judicial review for which new rules of standing apply: see *infra* at 120.

<sup>64</sup> [1903] 1 Ch 109; on appeal, [1903] 2 Ch 556; on further appeal, [1906] AC 1.

<sup>65</sup> [1903] 1 Ch at 114.

<sup>66</sup> *Gouriet v. Union of Post Office Workers* [1978] AC 435, following *London Passenger Transport Board v. Moscrop* [1942] AC 332.

<sup>67</sup> *Ware v. Regent's Canal Co* (1858) 3 De G & J 212 at 228; 44 ER 1250 at 1256.

strength of the special interest only,<sup>68</sup> the House of Lords took a more restrictive view in *Gouriet v. Union of Post Office Workers*.<sup>69</sup> The House held that only the Attorney-General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public,<sup>70</sup> for the courts had no jurisdiction to entertain such claims by a private individual who had not suffered and would not suffer damage. As Lord Wilberforce stated:<sup>71</sup>

It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.

(c) Injunctions in the context of EC law

The use of the injunction as a private law remedy for breach of EC law by a public authority was considered in *Garden Cottage Foods Ltd v. Milk Marketing Board*.<sup>72</sup> As will be recalled, the plaintiff in that case sought an interlocutory injunction, restraining the defendants from withholding supplies of milk from it.

The High Court (Parker J) was prepared to accept that the

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<sup>68</sup> See *Thorne v. BBC* [1967] 1 WLR 1104; *Lee v. Enfield LBC* (1967) 66 LGR 195; and *Bradbury v. Enfield LBC* [1967] 1 WLR 1311.

<sup>69</sup> [1978] AC 435. Although the case dealt with a declaration, it is relevant to a claim for an injunction both being essentially private law remedies for the protection of private rights.

<sup>70</sup> Although he might be able to do so if he were to sustain injury as a result of public wrong.

<sup>71</sup> Note 69 at 477.

<sup>72</sup> [1984] AC 130. For full facts of case see *infra* at 88.

plaintiff had made out an arguable case that the defendants were in breach of EEC Art 86 but, following the guidelines set out in *American Cyanamid Co v. Ethicon*,<sup>73</sup> he refused to grant an interlocutory injunction on the ground, *inter alia*, that damages would be an adequate remedy.

However, before the Court of Appeal, this decision was reversed in the main because of doubts about whether a remedy in damages was necessarily available for breach of EEC Art 86. Although Lord Denning MR<sup>74</sup> and May LJ<sup>75</sup> both thought that damages ought to be available, the Court of Appeal considered it possible that the court would decide eventually that the only available remedy was a permanent injunction and were thereby unwilling to refuse the plaintiff an interlocutory injunction in case damages turned out to be unavailable in this kind of action. Lord Denning MR thought<sup>76</sup> that -

the only effective remedy available in such a case as this is an injunction. The Common Market Commission have recently considered their own position about their ability to make interim orders. They said that they had power but they preferred it to be done by the national courts. They made a statement on February 20, 1980, in which they said (see *Kerse, E.E.C. Anti-trust Procedure* (1981), App. 1, p. 322):

"While not relevant to the present case, in general parties should consider whether a similar remedy may not be available from a national court before applying to the Commission - particularly if the national procedures are cheaper or the order more easily policed."

That especially applies to the present case. Undoubtedly the national procedures here for obtaining an injunction are cheaper. The order is

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<sup>73</sup> [1975] AC 396.

<sup>74</sup> [1982] QB 1114 at 1125.

<sup>75</sup> Note 74 at 1126.

<sup>76</sup> Note 74 at 1125.

more easily policed here by way of seeing that the injunction is obeyed. In the circumstances, I think that there is a remedy by injunction available in our courts to restrain a breach of article 86 of the Treaty: especially as that article says that it "shall be prohibited."

Consequently the Court of Appeal held *inter alia* that the remedy of an injunction was available in English courts to restrain abuse of a dominant market position contrary to EEC Art 86 and, in all the circumstances, an injunction was the *only* remedy which would be effective to protect the plaintiff. Accordingly, an injunction would be granted.

Despite being reversed on appeal to the House of Lords,<sup>77</sup> Lord Wilberforce's strong dissenting judgment deserves a brief analysis. He noted that the three members of the Court of Appeal expressed various degrees of uncertainty as to whether an action for damages lay for contravention of EEC Art 86 and that they held that an injunction was at any rate "an appropriate remedy." Lord Wilberforce accepted that this was the case, especially as EEC Art 86 was of direct effect and prohibited conduct in England was sanctioned by the grant of an injunction:<sup>78</sup>

There is of course nothing illogical or even unusual in a situation in which a person's rights extend to an injunction but not to damages - many such exist in English law. Community law which is what the English court would be applying is, in any case, *sui generis* and the wording used in article 86 "prohibited" and "so far as it may affect trade between member states" suggest that this may be such a case - the purpose of this article in the Treaty being, so far as necessary, to stop such practices continuing.

He rejected the conversion of breach of EEC Art 86 into

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<sup>77</sup> Note 72 *ibid*.

<sup>78</sup> Note 72 at 152.

the English tortious cause of action of breach of statutory duty as suggested by Lord Diplock. The "enforceable Community rights" in the European Communities Act 1972, s2(1) were to be protected as such and the formulation of the prohibition in EEC Art 86 suggested that the right of the victims of its violation extended to an injunction but not to damages:<sup>79</sup>

To say that thereby what is prohibited action becomes a tort or a "breach of statutory duty" is, in my opinion, a conclusionary statement concealing a vital and unexpressed step. All that section 2 says (relevantly) is that rights arising under the Treaty are to be available in law in the United Kingdom, but this does not suggest any transformation or enlargement in their character. Indeed the section calls them "enforceable Community rights"- not rights arising under United Kingdom law.

Lord Wilberforce also pointed out<sup>80</sup> that the only remedies actually provided by EC law itself were orders restraining future violations and fines which were not paid to the injured party.

In conclusion, he considered the effectiveness of damages or an injunction in remedying the breach of directly effective EEC Art 86:<sup>81</sup>

At the end of the day, even assuming that the plaintiff company is held entitled to damages, the quantum must be wholly uncertain and it may not be possible for it to resume business at all. On the decision of the Court of Appeal the status quo is preserved until the trial, i.e. the M.M.B. must observe a policy of "open door" and "no discrimination." The plaintiff company's business is preserved; on the hypothesis that it remains profitable, it will be in a position to pay damages to the M.M.B. if it fails in the action. This course of action is in line with what the European Court of Justice thought appropriate in *Camera Care*

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<sup>79</sup> Note 72 at 151-152.

<sup>80</sup> Note 72 at 151.

<sup>81</sup> Note 72 at 154.

*Ltd. v. Commission of European Communities....* I cannot avoid the conclusion that the Court of Appeal's order makes for better justice and I see nothing wrong with it in law.

Consequently, it is submitted that the injunction is obviously available to remedy breaches of EEC Arts 85 and 86. Such a position is supported by the existence of a prohibitive remedy at the Community level in the form of the cease and desist order under EEC Reg 17/62, art 3 and by the decision of the ECJ in the *Camera Case* case<sup>82</sup> which held that the Commission had powers to grant interim relief.

In the same way, where other directly effective Treaty and subordinate provisions are involved, the injunction should be available - EEC Arts 85 and 86 are not *leges speciales* as regards this type of remedy. For instance, in cases brought for violation of EEC Art 34,<sup>83</sup> it has been suggested<sup>84</sup> that the national court would not face the barrage of economic evidence that tends to accompany pure antitrust cases and hence the task of drafting a suitable form of words<sup>85</sup> for an injunction is much facilitated.

Despite the apparent utility and effectiveness of this remedy, the Crown Proceedings Act 1947, s21 - which prevents injunctions being granted against the Crown - formerly proved to be an obstacle.<sup>86</sup> It was submitted,<sup>87</sup> however, that such

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<sup>82</sup> Case 792/79R *Camera Care v. Commission* [1980] ECR 119.

<sup>83</sup> Which prohibits quantitative restrictions and measures having equivalent effect to exports.

<sup>84</sup> Green, 'The Treaty of Rome, National Courts, and English Common Law: The Enforcement of European Competition Law After *Milk Marketing Board*' *RabelsZ* 48 (1984) 509 at 536.

<sup>85</sup> A problem pointed out in *Garden Cottage Foods*.

<sup>86</sup> See *supra* at 69.

a statute should not deter the courts from giving full protection to rights deriving from directly effective EC law, even if this were to entail the granting of injunctive relief in favour of an individual against a public body.

The question whether an injunction was available against the Crown or its Ministers<sup>88</sup> arose in *R v. Transport Secretary, ex parte Factortame Ltd.*<sup>89</sup> The applicant companies, most of whom were Spanish, owned 95 fishing vessels registered as British under the relevant statutory regime.<sup>90</sup> This regime was radically altered by the Merchant Shipping Act 1988, Part II and its related regulations<sup>91</sup> by which all vessels were to be re-registered, subject to a transitional period during which the previous registration was to continue in force. Under the new Act, the 95 vessels failed to satisfy the new conditions imposed and thus failed to qualify for registration because either they were managed or controlled from Spain or by Spanish nationals or by reason of the proportion of the shares in the applicant companies being owned by Spaniards.

The companies by application for judicial review sought to challenge the legality of the relevant provisions of the new Act and Regulations on the ground that they contravened *inter alia* the EEC Treaty by depriving them of enforceable

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<sup>87</sup> See Oliver, 'Enforcing Community Rights in the English Courts' (1987) 50 MLR 881 at 904-905.

<sup>88</sup> Which must be sought in an application for judicial review, see *infra* at 120.

<sup>89</sup> [1989] 2 WLR 997.

<sup>90</sup> Merchant Shipping Act 1894.

<sup>91</sup> Merchant Shipping (Registration of Fishing Vessels) Regulations 1988.

Community rights.

The Divisional Court of the Queen's Bench Division<sup>92</sup> requested a preliminary ruling from the ECJ on the substantive questions of EC law and, on a motion by the applicants for interim relief, ordered that pending final judgment or further order, the operation of the relevant provisions of the 1988 Act and Regulations be disapplied and the Transport Secretary be restrained from enforcing them in respect of the applicants and their vessels so as to enable the continuation of the existing registration.

On appeal by the Minister, the Court of Appeal<sup>93</sup> set aside the order for interim relief.

On further appeal by the applicants, the House of Lords<sup>94</sup> held *inter alia* that (i) British courts had no power to make an order declaring an Act of Parliament not to be the law until some uncertain future date, *i.e.* the courts could not interfere temporarily with the operation of a statute as such as conflicting with EC law where the conflict with EC law was not clear, pending a ruling the ECJ; and (ii) moreover, the court had no power to grant an interim injunction against the Crown in judicial review proceedings because injunctions had never been available at common law in proceedings on the Crown side and that position had effectively been preserved by the Crown Proceedings Act 1947, ss 21(2) and 23(2)(b). Furthermore the Supreme Court Act 1981, s31(2) had not conferred a new jurisdiction on the court to grant interim injunctions against

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<sup>92</sup> [1989] 2 CMLR 353.

<sup>93</sup> [1989] 2 CMLR 353.

<sup>94</sup> Note 89 *ibid.*



the Crown in judicial review proceedings and RSC Ord 53, r1(2) - which was in identical terms - could not extend the jurisdiction of the court in that respect.

Accordingly, the applicants were therefore not entitled to interim relief.

In the meantime, the House of Lords sought a preliminary ruling from the ECJ *inter alia* on whether, irrespective of the position under national law, there was an overriding principle of Community law that a national court was under an obligation to provide an effective interlocutory remedy to protect directly effective EC rights (a) where a seriously arguable claim of entitlement to such rights was advanced and (b) the party claiming those rights would suffer irreparable damage if he were not effectively to be protected during the interim period pending determination of those rights by the ECJ.

In its ruling,<sup>95</sup> the ECJ took the view that it was being asked whether a national court, confronted by a domestic law which precluded it from granting interim relief, was entitled to disregard such a rule. Having emphasised the need for the effective protection of EC rights with which task the national courts were entrusted, it continued:<sup>96</sup>

The full effectiveness of Community law would be ... impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.

It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

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<sup>95</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>96</sup> Note 95 *ibid*.

As a result, the House of Lords decided to grant an interim injunction suspending the residence and domicile requirements of the Merchant Shipping Act 1988 and invited the parties to agree the form the injunction should take.<sup>97</sup>

The immediate consequence of the ECJ decision<sup>98</sup> was to vest the English courts with jurisdiction to grant an interim injunction<sup>99</sup> to temporarily disapply any provision of national law, whether primary or secondary or a purely administrative decision, which allegedly violated EC law.

It is to be noted, however, that the ECJ refrained from pronouncing on the circumstances in which such a power should be exercised. In such case, it has been suggested<sup>100</sup> that the grant of interim relief against primary legislation should be subject to more stringent conditions than those applying to secondary legislation or to administrative decisions: it was thought that some version of the *American Cyanamid* criteria<sup>101</sup> adapted to the field of public law and variable according to circumstances might be appropriate.

In present circumstances then, it is submitted<sup>102</sup> that in the absence of a remedy in damages, in proceedings for the enforcement of Community law, interim injunctive relief is now

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<sup>97</sup> *The Independent* 12th July 1990.

<sup>98</sup> Barav, 'Interim relief and English courts' (1990) 140 New LJ 896 at 899.

<sup>99</sup> A stay of proceedings is also available: *R v. Education & Science Secretary ex parte Avon CC*, *The Times* 29th May 1990; an interim declaration may be obtainable despite *IRC v. Rossminster* [1980] AC 952.

<sup>100</sup> Barav, *loc. cit.*

<sup>101</sup> See *supra* at 71.

<sup>102</sup> Following Oliver, *loc. cit.* at 904-905.

available against the Crown and its officers despite the provisions of the Crown Proceedings Act 1947.

(4) DAMAGES

(a) General principles

Except to the extent provided for by statute, public authorities, including Ministers of the Crown, enjoy no dispensation from the ordinary law of tort and contract. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence and so forth.<sup>103</sup> Likewise, they are subject to the ordinary law of master and servant, by which the employer is liable for torts committed by the employee in the course of his employment, the employee also being personally liable.<sup>104</sup>

Since it is necessary to bring a claim for damages for breach of EC law within one of the existing categories of tort, for present purposes two particular causes of action giving rise to a remedy in damages appear to be most relevant viz. breach of statutory duty and misfeasance in public office.<sup>105</sup> Both have been considered by the English courts as appropriate grounds for seeking compensation for loss arising from breach of EC law and both are causes of action of long

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<sup>103</sup> See generally Wade, *op. cit.* at 751-753.

<sup>104</sup> But there are situations in which an officer of central or local government has an independent statutory liability by virtue of his office, imposing duties upon him as a designated officer rather than on the public authority who appoints him. Where there is a breach of such a duty only the employee will be liable: see Wade, *op. cit.* at 752-753.

<sup>105</sup> Lord Denning's suggestion in *Application des Gaz SA v. Falks Veritas Ltd* ([1974] Ch 381) that EEC Arts 85 and 86 create new torts or wrongs has not found widespread acceptance. It was doubted by Roskill LJ in *Valor International v. Application des Gaz* ([1978] 3 CMLR 87). Moreover, the claim under this head was withdrawn both in *Garden Cottage Foods v. Milk Marketing Board* ([1984] AC 130) and *Bourgoin SA v. Ministry of Agriculture* ([1986] Ch 716) and it is therefore intended not to discuss this doubted category of tort.

standing which have been utilised by private individuals seeking redress against tortious acts of public authorities.

(b) Breach of statutory duty

The general rule governing the liability of public bodies or public officers for breach of statutory duty is defined in general terms, viz. where a public body has a duty imposed on it by statute, a private action to recover damages may lie at the suit of anyone injured by a breach thereof.<sup>106</sup>

The general rule of liability for breach of statutory duty within the context of public law was stated by Lord Lyndhurst LC in *Ferguson v. Earl of Kinnoul*:<sup>107</sup>

When a person has an important duty to perform, he is bound to perform that duty; and if he neglects or refuses to do so, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.

However, towards the end of the 19th century the courts sought to narrow the scope of the duty<sup>108</sup> on the grounds that with the vast increase in legislative activity, the old rule might lead to liabilities wider than the legislature could possibly have contemplated. Although, even today, it is not clear where the limits of this liability lie,<sup>109</sup> it is

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<sup>106</sup> Wade, *op. cit.* at 772-776.

<sup>107</sup> (1842) 9 Cl & F 251 at 279; 9 ER 412 at 523. See also *Pickering v. James* (1873) LR 8 CP 489 at 503, *per* Bovill CJ.

<sup>108</sup> *Atkinson v. Newcastle Waterworks Co* (1877) 2 Ex D 441. Although distinguished in *Dawson & Co v. Bingley UDC* [1911] 2 KB 149, the courts have in the main applied the now more restrictive criteria which govern breach of statutory duty.

<sup>109</sup> Wade, *op. cit.* at 775: "Almost all administrative duties are statutory, but not every default entails liability in damages."

generally accepted that these are to be ascertained by determining the legislative intention behind the particular statute.

Consequently, where Parliament has stated or clearly implied its intention in the wording of the Act, no problem arises<sup>110</sup> and where a duty is imposed by statute but no sanction of any kind is provided, there is a presumption that a person injured by its breach has a right of action.<sup>111</sup> But where the statute provides a sanction in the form of a penalty or administrative action and yet remains silent on the question whether a civil remedy is also available, it is then a matter of construction whether or not a civil remedy may be awarded.

In such circumstances the plaintiff must prove that:

(i) the statute imposes a clear and precise duty that is owed to him, *i.e.* he has *locus standi* in that he is a member of a "class" sought to be protected by the statute and not a member of the public at large.<sup>112</sup> The determination of the "class" protected by the broad principles expressed in, *e.g.* EEC Arts 85 and 86 (the "competition provisions") and EEC Arts 30-34 (the "goods provisions"), in ensuring free competition and

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<sup>110</sup> Occasionally the statute will confer that right, *e.g.* Sex Discrimination Act 1975 (c65), s65(1)(b) and Race Relations Act 1976 (c74), s56(1)(b); and sometimes it will exclude it.

<sup>111</sup> *Doe v. Bridges* (1831) 1 B & Ad 847 at 849 per Lord Tenterden CJ; *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398 at 407 per Lord Simonds; *Thornton v. Kirklees BC* [1979] QB 626.

<sup>112</sup> *Clegg, Parkinson & Co v. Earby Gas Co* [1896] QB 592; *Groves v. Wimbourne* [1896] 2 QB 402; but *cf.* *Phillips v. Britannia Hygienic Laundry Co* [1923] 2 KB 832.

free movement of goods is one of the central problems facing the English courts in the use of this remedy.<sup>113</sup>

(ii) the damage suffered is of a species which the statute is intended to protect;<sup>114</sup>

(iii) the defendant infringed his statutory obligations;<sup>115</sup>

(iv) the infringement caused the plaintiff's loss.<sup>116</sup>

Such considerations are subject to the proviso that if the enactment itself provides an alternative remedy or an adequate common law remedy exists, the court will be reluctant to permit the cause of action.<sup>117</sup>

(c) Breach of statutory duty in EC law

Against this background, statutory duties under EC law must be considered. Since the duties of the UK national authorities arising and under EC law are to be given legal effect and to be enforceable by the provisions of the European Communities Act 1972, s2(1), such duties may, in a general sense, be called statutory. But it is as yet uncertain as to how far these EC duties are subject to the rules above and how

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<sup>113</sup> This is discussed *infra* at 93.

<sup>114</sup> *Gorris v. Scott* (1874) LR 9 Exch 125. It has been said that this second condition is in practical effect the same as the first condition: see Buckley, 'Liability in Tort for Breach of Statutory Duty' (1984) 100 LQR 204 at 210-213 and at 232.

<sup>115</sup> *Chipcase v. British Titan Productions Co* [1956] 1 QB 545; *John Summers & Sons Ltd v. Frost* [1955] AC 740.

<sup>116</sup> *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613; *Wigley v. British Vinegars Ltd* [1964] AC 307; *Lineker v. Raleigh Industries* [1980] ICR 83.

<sup>117</sup> *Phillips v. Britannia Hygienic Laundry Co* [1923] 2 KB 832; *Monk v. Warbey* [1935] 1 KB 75; *McCall v. Abelesz* [1976] QB 585.

far they may be enforceable by actions for damages in the courts.<sup>118</sup> The answer, it is suggested, will probably depend upon the nature of the particular duty in each case.

In the context of EC law, damages for breach of statutory duty were claimed by the plaintiffs in *Garden Cottage Foods Ltd v. Milk Marketing Board*.<sup>119</sup>

The case concerned the defendants who produced most of the bulk butter in England and Wales that was sold to distributors in this country for resale within the common market of the EEC. The plaintiffs bought substantial quantities of butter from the defendants which they resold overseas but were later told that, after a certain date, the defendants would be supplying bulk butter only to four named distributors which did not include the plaintiffs. In fact, if the plaintiffs wanted butter supplied by the defendants for export, they would have to contract one or more of the four distributors.

Consequently, the plaintiffs brought proceedings against the defendants, claiming that the latter's conduct amounted to an "abuse... of a dominant position within the Common Market" within EEC Art 86 and applied, *inter alia*, for an interlocutory injunction restraining the defendants from withholding supplies of butter from the plaintiffs or otherwise refusing to maintain normal business relations with them contrary to EEC Art 86.

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<sup>118</sup> The question has so far arisen only in preliminary proceedings.

<sup>119</sup> [1984] AC 130.



The High Court (Parker J) held that there was a serious question to be tried on whether the defendants had a dominant position in a substantial part of the common market which they were abusing, but refused the application on the ground, *inter alia*, that an award of damages would be a satisfactory remedy if the plaintiffs succeeded at the trial of the merits and that therefore, at the interlocutory stage, there was no need to grant an injunction:<sup>120</sup>

I reject the application for interlocutory relief on two principle grounds which may overlap each other, which come within the balance of convenience. The position is as follows. If no relief is granted the plaintiff is still able to purchase butter albeit less profitably from four appointed distributors and others. It would therefore appear that a remedy of damages would be available in due course. If relief though is granted the defendants will have to disrupt their business and business of their distributors.

On appeal by the plaintiffs, the Court of Appeal (Lord Denning MR, May LJ and Sir Sebag Shaw) expressed doubts on whether damages would be recoverable by the plaintiffs in the event of their success and allowed the appeal, granting an interlocutory injunction.

On further appeal by the defendants, the House of Lords allowed the appeal (Lord Wilberforce dissenting) and held that if, which was clearly arguable, an infringement of EEC Art 86 would give rise in English law to a cause of action at the suit of an individual citizen who suffered pecuniary loss by reason of the infringement, a remedy in damages would be available to compensate for such loss; and that the contrary

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<sup>120</sup> Unreported: See page 4 of the agreed note of the judgment taken by the solicitors.

view, although espoused by a unanimous Court of Appeal, was unarguable.

Lord Diplock, delivering the judgment of the majority in the House of Lords, stated that EEC Art 86 had been declared by the ECJ to be of direct effect<sup>121</sup> and created direct rights in respect of the individuals concerned which the national courts had to protect. He continued:<sup>122</sup>

This decision of the European Court of Justice as to the effect of article 86 is one which section 3(1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2(1) of the Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly.

*A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.*

If this categorization be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of a particular kinds of conduct rather than the positive form of an obligation to do particular acts ... it has never been suggested that it makes any difference to the cause of action whether the breach relied on was a failure to perform a positive duty or the doing of a prohibited act. [Emphasis supplied.]

Moreover, in his conclusion of the issue, he re-emphasised his position:<sup>123</sup>

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<sup>121</sup> Case 127/73 *BRT v. SABAM* [1974] ECR 51.

<sup>122</sup> Note 119 at 141.

<sup>123</sup> Note 119 at 144.

I... find it difficult to see how it can ultimately be successfully argued ... that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty.

Indeed logic and justice suggest that Lord Diplock was correct: there are no reasons why a damages remedy should not be available despite the catalogue of various objections and hypothetical arguments provided by Lord Wilberforce to act as a counterweight to the majority decision.<sup>124</sup>

In a strong dissent, he contended that it was not necessary at that stage to decide whether such an action was available. He pointed to the various degrees of uncertainty expressed by each member of the Court of Appeal as to whether an action for damages lay for contravention of EEC Art 86 and that they had been correct to hold that an injunction was the appropriate remedy. Lord Wilberforce rejected the conversion of a breach of EEC Art 86 into the tort of breach of statutory duty as suggested by Lord Diplock and stated:<sup>125</sup>

So far as the Community is concerned, article 86 is enforced under Regulation No. 17 by orders to desist (article 3), and if necessary by fines (article 15), and the Court of Justice has similar powers on review. Fines are not payable to persons injured by the prohibited conduct, and there is no way under Community law by which such persons can get damages. So the question is, whether the situation is changed, and the remedy extended, by the incorporation of article 86 into our law by section 2 of the European Communities Act 1972. To say that thereby what is prohibited action becomes a tort or "breach of statutory duty" is, in my opinion, a conclusionary statement concealing a vital and unexpressed step. All that section 2 says (relevantly) is that rights arising under the Treaty are to be available in law in the United Kingdom, but this does not suggest any transformation or

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<sup>124</sup> Note 119 at 150-155.

<sup>125</sup> Note 119 at 151-152.

enlargement in their character. Indeed the section calls them "enforceable Community rights" - not rights arising under United Kingdom law.

In addition, he considered that the formulation of the prohibition in EEC Art 86 suggested that the right of the victims of its violations, in many instances under English law, extended to an injunction and not to damages.

On his understanding, therefore, a remedy in damages from the cause of breach of statutory duty would not lie because this would conflict with Community procedures for enforcement. This implies that if only cease and desist orders and punitive fines were available when the EC provision was pleaded at Community level, additional domestic remedies could not be utilised when such provision was pleaded at national level. It is submitted that Lord Wilberforce ignores the essential point concerning the dualist nature of Community provisions. In *Molkerei-Zentrale Westfalen*,<sup>126</sup> the ECJ explained:<sup>127</sup>

It thus appears that the guarantees given to individuals under the Treaty to safeguard their individual rights and the powers granted to the Community institutions with regard to the observance by the States of their obligations have different objects, aims and effects and a parallel may not be drawn between them.

It is clear from this statement that domestic remedies may flourish without reference to the availability or lack of a Community means of enforcement. The existence of an EEC

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<sup>126</sup> Case 28/67 *Firma Molkerei-Zentrale Westfalen v. Hauptzollamt Paderborn* [1968] ECR 143.

<sup>127</sup> Note 126 at 153.

Article<sup>128</sup> or of an EEC Regulation<sup>129</sup> is no obstacle to national development.

In *Garden Cottage Foods*, then, all their Lordships were of the view that a private person could sue in England to prevent a breach of EEC Art 86 (and by implication, EEC Art 85); whilst conceding that the matter was not to be finally decided in the instant context of appeal in interlocutory proceedings, the majority took the view that a remedy in damages was available against public authorities for breach of EC competition rules by way of an action for breach of statutory duty.

It has been considered<sup>130</sup> that the use of this tort is apt as a guarantor of directly effective rights and, indeed, that the conditions precedent for its application are akin to those of direct effect:<sup>131</sup>

In both the English tort and direct effect, one commences with a legislative enactment and proceeds thereafter to examine its terms and language to determine whether a private citizen may employ it as either sword or shield in legal battle.

But there have been objections to the use of such a remedy for breach of EEC Articles.

For example, while certain provisions of EC law could be construed as intended to benefit members of a particular class,<sup>132</sup> the primary purpose of the competition and goods

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<sup>128</sup> In that case, EEC Art 169.

<sup>129</sup> In that case, EEC Reg 17/62.

<sup>130</sup> *Green & Barav 'Damages in the National Courts for Breach of Community Law'* (1986) 6 YEL 55 at 98-101.

<sup>131</sup> *Green & Barav, loc. cit.* at 98.

<sup>132</sup> e.g. EEC Art 119 (Equal pay for equal work for men and women); EEC Art 48 (Freedom of movement for workers).

provisions is to promote competition and free trade (and thereby facilitate general economic prosperity) within the Common Market. It has been submitted<sup>133</sup> that it requires both ingenuity and determination to construe these provisions as intended to protect the economic interests of individual traders. Indeed, it is said, the right conferred on individuals by directly effective EC law is the right to invoke such law in proceedings before domestic courts. It is in no way analogous to the benefit conferred by a specific statute on a particular class.

To this objection, one may cite<sup>134</sup> the almost identical distinction established in EC law between the general public and those specifically entitled to claim *locus standi*. As Capotorti AG stated in *Rewe v. Hauptzollamt Kiel*:<sup>135</sup>

In fact every legal provision does of course by its nature reflect collective interests, even beyond the classes of persons to whom it applies; thus persons who have an interest in the enforcement of a particular provision are much more numerous than those who have a right, or who may be able to claim a right, under that provision.... Accordingly, a person who merely has an interest in the enforcement of a rule, or more precisely, a person who does not stand in a specific legal relationship based on the rule, is not entitled to rely upon that rule before the courts.

By pointing to the similarity between the conditions precedent to direct effect and breach of statutory duty, a reply may be furnished to the undoubted problems which occur in defining such a class in the European context.

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<sup>133</sup> Steiner, 'How to Make the Action Suit the Case: Domestic Remedies for breach of EEC law' (1987) 12 EL Rev 102 at 108.

<sup>134</sup> Green & Barav, *loc. cit.* at 99.

<sup>135</sup> Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805 at 1849-1850.

Another objection,<sup>136</sup> based on the dissenting opinion of Lord Wilberforce, points first to the lack of any provision of the EEC Treaty or its secondary legislation indicating that a breach *per se* of Community law is intended to give rise to a remedy in damages; and, secondly, that where sanctions are provided under EC law, they are limited to penalties and fines.<sup>137</sup>

The argument continues<sup>138</sup> by indicating that although civil actions brought before the English courts in respect of EEC Art 86 (and by implication EEC Art 85) infringements may be appropriately framed - as Lord Diplock stated<sup>139</sup> - as actions for breach of statutory duty, this does not dispense with the need in such actions to consider whether or not the particular statute or treaty provision, breach of which is claimed, provides for or at least allows of a remedy of the type sought by the individual. Such an examination in *Garden Cottage Foods*, it was submitted, rather tended to support the view that EEC Art 86 did indeed intend at most only to confer upon the individual litigant a right to injunctive relief.

This particular view, it is submitted, may be challenged on the basis of EC and English law. First, by reference to the quote from the *Molkerei-Zentrale Westfalen* case cited above,<sup>140</sup> which points out that since "a parallel may not be

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<sup>136</sup> Steiner, *loc. cit.* at 109; Claydon 'Civil Actions under Articles 85 and 86 of the EEC Treaty: The Garden Cottage Case' [1983] 4 ECLR 245 at 250.

<sup>137</sup> *e.g.* EEC Reg 17/62, arts 15 and 16.

<sup>138</sup> Claydon, *loc. cit.*

<sup>139</sup> [1984] AC 130 at 141.

<sup>140</sup> See *supra* at 92.

drawn" between actions brought by individuals before national courts and those brought by the EEC Commission before the ECJ, the lack of Community provisions providing for damages for a breach *per se* of EC law therefore does not entail a denial of the availability of such remedy before the national courts.

Secondly, in *Rewe v. Hauptzollamt Kiel*,<sup>141</sup> the ECJ stated that although it was not intended to create new remedies -<sup>142</sup>

the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.

There is therefore a very strong case to be made out for damages, more especially under English law by use of the Chancery Amendment Act 1858,<sup>143</sup> s2 of which provided :

In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

Where a case for an injunction may be made, the court is entitled to award damages in lieu. As has been expressly

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<sup>141</sup> Note 135 *ibid*.

<sup>142</sup> Note 135 at 1838.

<sup>143</sup> Chancery Amendment Act 1858 (21 & 22 Vict, c27) (Lord Cairns' Act) - now enshrined in the Supreme Court Act 1981 (c54), s50.



recognised by Lord Diplock in *Garden Cottage Foods*,<sup>144</sup> a damages award may be made the surrogate of an injunctive remedy where EEC Articles are concerned. Consequently, where the applicant satisfies the court that an injunction is awardable, damages may be awarded additionally or as an alternative.

The question whether damages were available for breach of any EEC Treaty provision, on the basis that it constituted a breach of statutory duty, was later considered by the Court of Appeal in *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*.<sup>145</sup>

The plaintiffs in that case were concerned in the production in France of frozen turkeys and in their sale and distribution within the United Kingdom: they imported the turkeys into the United Kingdom under a general licence granted by the defendant. On 1st September 1981 the defendant, purporting to act in the interests of preventing the spread of a particularly contagious disease into the United Kingdom, revoked the licence and replaced it with one which had the effect of prohibiting the importation of turkeys from France. The ECJ subsequently held<sup>146</sup> that the withdrawal of the licence had constituted a contravention of EEC Art 30 and had therefore been *ultra vires*; in consequence of that decision the defendant issued a licence which permitted the resumption of such importation from November 1982.

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<sup>144</sup> [1984] AC 130 at 141.

<sup>145</sup> [1986] QB 716.

<sup>146</sup> Case 40/82 *Commission v. United Kingdom* [1982] ECR 2793.

For their part, the plaintiffs brought proceedings claiming damages. They alleged in their amended statement of claim, *inter alia*, that (a) the withdrawal of the licence and the defendant's refusal subsequently to permit turkeys to be imported into the United Kingdom from France had caused them substantial loss and damage; and (b) such loss and damage had been caused by the defendant's breach of statutory duty under EEC Art 30 and that such a breach sounded in damages.

On the trial of the preliminary issues whether the amended statement of claim disclosed any causes of action, Mann J gave judgment for the plaintiffs holding, *inter alia*, that, since EEC Art 30 had direct effect, it conferred on persons injured by a contravention a cause of action in damages and that the defendant was liable to the plaintiffs for any damage which had flowed from the withdrawal of the licence as pleaded by the plaintiffs.

Mann J briefly discussed authorities relating to the conditions necessary for the tort<sup>147</sup> and observed that Lord Diplock's speech in *Garden Cottage Foods* contained no references to any of the authorities which would have assisted in determining whether a domestic statutory provision gave an action for breach of statutory duty.<sup>148</sup> Consequently, Lord Diplock must have *presumed* the tort to exist for the protection of directly effective rights rather than *methodically worked out* that such was the case.

But, he continued, the present case was concerned with EEC Art 30 and not EEC Art 86: he therefore wondered whether

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<sup>147</sup> Note 145 at 728-729.

<sup>148</sup> Note 145 at 732.

there was any sensible distinction between the two and stated the nature of the defendants' argument which had sought to draw such a distinction:<sup>149</sup>

Article 30, the [defendant] said, is not for the benefit of individuals but it is for the benefit of the economic prosperity of the European Economic Community. As a provision operating so as to benefit, and having the object of benefiting, all citizens, it is enforceable at the instance of an individual by judicial review seeking declaratory relief, whilst article 86 is concerned with relationships between, and is for the benefit of, individuals and is thus enforceable at the instance of an individual by an action for damages. In short it was said the rights conferred by the two articles are different in nature and each is adequately protected by the remedy suggested as being appropriate to it.

On the sole basis that EEC Arts 30 and 86 each had direct effect, he was unable to differentiate between them. He thereby followed the lead of the House of Lords in *Garden Cottage Foods* and extended a right of action for damages for breach of EC law to EEC Art 30. In his view, a contravention of EEC Art 30 which caused damage to a person entitled that person to claim damages for breach of statutory duty, the duty being one imposed by EEC Art 30 (as interpreted by the ECJ) and the European Communities Act 1972, s2(1) when read in conjunction.

On appeal, the majority of the Court of Appeal (Parker and Nourse LJ) held that EEC Art 30 was not actionable as a breach of statutory duty. In delivering the majority judgment, Parker LJ first sought to identify the actual nature of the obligation imposed by EEC Art 30 in order to differentiate it from that imposed by EEC Art 86. He said:<sup>150</sup>

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<sup>149</sup> Note 145 at 733.

<sup>150</sup> Note 145 at 781.

Under article 86, for example, the obligation is upon undertakings not to abuse a dominant position. In such a case, if a dominant position is abused by an undertaking and damage flows, the situation is different from that which prevails in relation to a breach of article 30. Under that article a measure imposing restrictions is automatically void if not justified under article 36. The obligation on the member state is therefore an obligation not to impose a wholly ineffective measure. The right not to be subjected to an ineffective measure is however wholly different from a right not to be subjected to abuse of a dominant position; in the one case the subject of complaint is an actual operative abuse. In the other it is an inoperative measure.

Next, he underlined the principle of administrative law common to most Member States, and expressly recognised and incorporated into the ECJ's jurisprudence under EEC Art 215, that a governmental authority should be protected from the consequences of its own wrongful yet *bona fide* acts. This was sound administrative policy said Parker LJ and he continued:<sup>151</sup>

In some cases indeed there may be a greater need to deny a remedy in damages in respect of such an act save in cases of abuse of power. Where an application for a licence to import a drug is made and the minister has evidence that it is dangerous, is he or the member state to be exposed to damages if they act on available evidence but get it wrong? I would not so conclude unless driven. Member states and their ministers and officers may not be under a statutory duty to protect human or animal life or public morality and so on but it is surely their political duty to do so. It is one thing if they knowingly abuse their powers. It is quite another if they make an honest error.

Parker LJ, earlier in his judgment, had referred to the case law of the ECJ on EEC Art 215 under which actions for damages or compensation may be brought against the Community in respect of its non-contractual liability. In particular he

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<sup>151</sup> Note 145 at 784.

relied on *Bayerische HNL v. EC Council*<sup>152</sup> and *Koninklijke Scholten Honig v. EC Council*<sup>153</sup> in which it was held that the Community does not incur liability for legislative measures which are the result of choices of economic policy unless the institution concerned has manifestly and gravely disregarded the limits of the exercise of its powers. He pointed out, the UK Government might enact measures implementing Community legislation which subsequently turned out to be invalid; in such circumstances it would be anomalous if the Community were not liable in damages for its legislation but the UK Government was. As Parker LJ stated:<sup>154</sup>

There is nothing in the decisions of the European Court which positively or specifically requires that for a breach by a member state of article 30, a remedy in damages must be available to an individual who suffers damage by the breach. Indeed the decisions of the European Court point forcefully to the conclusion that a remedy in damages is not required by Community law for breach by a member state of an article having direct effect where such breach consists in the imposition of a legislative or quasi-legislative measure involving the exercise of judgment unless the breach is of a particularly serious character.

Consequently, *Garden Cottage Foods* was not to be relied on for asserting the tort of breach of statutory duty within the context of acts of the public administration particularly since the jurisprudence of the ECJ suggested that more than a mere breach was required to incur liability:<sup>155</sup>

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<sup>152</sup> Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v. EC Council* [1978] ECR 1209.

<sup>153</sup> Case 143/77 *Koninklijke Scholten Honig NV v. EC Council* [1979] ECR 3583.

<sup>154</sup> Note 145 at 780.

<sup>155</sup> Note 145 at 787.

I can find nothing in Lord Diplock's speech to suggest that he had in mind for one moment that breach by a member state of a negative obligation in relation to measure could be categorised as, or be of the nature of, a breach of statutory duty giving rise to a civil cause of action in private law. He expressly leaves out of account such matters. The reference to individual rights is in my judgment without significance. An individual right may be a right in private law or in public law; article 30 in my judgment creates individual rights both in public law and private law. A breach simpliciter of the article sounds only in public law. A breach amounting to abuse of power sounds in private law. Neither can be categorised as, or be regarded as being of the nature of, a breach of statutory duty in any sense known to English law. Nothing in Lord Diplock's speech leads me to suppose that either he or those who agreed with him would have done so had they had to consider the matter.

In the light of these considerations, Parker and Nourse LJJ took the view that judicial review would be an adequate remedy.

Despite the logic of the majority judgment, the dissent of Oliver LJ also proceeds with a logic based on sound principles of EC law<sup>156</sup> which led him to conclude that the rights conferred on individuals by EEC Art 30 and the correlative obligations which Member States owed to individuals constituted statutory duties and were enforceable in the same manner as any other private law right including an action for damages for breach of statutory duty.

Oliver LJ first considered that the decision of the House of Lords in *Garden Cottage Foods* was not to be confined to EEC Art 86 and rejected the differentiation of these two provisions drawn by Parker LJ concluding:<sup>157</sup>

To say that the "right" conferred by article 30 on the individual is merely a right not to be subjected

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<sup>156</sup> Green & Barav, *loc. cit.* at 106.

<sup>157</sup> Note 145 at 766.

to inoperative measures or regulations, is no doubt a description which incorporates reference to the most usual cause for the "right" being infringed, but as a qualitative definition of the right it appears to me incomplete. It would be equally accurate to say positively that the individual's "right" is a right to carry on the business of importing goods free from quantitative restrictions, whether imposed by legally ineffective measures or imposed without any colour or legal title at all, just as the individual's "right" under article 86 is a right to carry on his business free from illegal abusive measures by those, whether themselves individuals or organs of member states, who are in a dominant position. In the ultimate analysis, the individual's complaint is of the same nature in each case, namely that his business has been interfered with and damaged by that which the Treaty prohibits, whether it be abusive of dominant position or denial or impediment of entry to his goods.

Secondly, with reference to issues surrounding restitution of sums levied by national authorities in breach of EC law, Oliver LJ considered the issue of the availability of financial remedies against Member States. Through a line of ECJ authorities,<sup>158</sup> he sought to establish that a right to such restitution existed and did not depend upon the degree of fault, or the existence of a *bona fide* error, on the part of the national authority. What is more, Oliver LJ said that the ECJ's jurisprudence on the matter had established that an action for restitution might operate in circumstances where an equivalent action would not lie in national law. In view of this position he said:<sup>159</sup>

These cases, in my judgment, in addition to furnishing useful guidance as to the nature of the rights created by directly effective articles, provide also the answer to the argument that whereas articles 85 and 86 by their nature require that the individual's right be enforced by damages (since the rights and duties necessarily, or almost necessarily, arise between individuals and an

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<sup>158</sup> Note 145 at 762-765.

<sup>159</sup> Note 145 at 765.

individual cannot apply to the court under article 170), no such requirement exists in the case of article 30. A claim for damages for loss sustained is in my judgment essentially no different in kind from a claim for the reimbursement of unlawfully levied moneys which the cases treat as an adjunct to the right created in the individual by the directly effective provision of the Treaty.

Lastly, he examined whether the distinction between the two EEC Articles was justified on public policy grounds, viz. that if under EC law the Community was protected against individual claims for damages, whether the administrative and legislative organs of a Member State should not be equally protected as a matter of policy. Oliver LJ replied to this argument stating:<sup>160</sup>

But once the article has been construed by the Community jurisprudence as one which does in fact give rise to individual rights then it must, as it seems to me, be treated as such by the domestic courts and it must be afforded the same protection that those courts afford to an individual injured by the breach of a domestic statute which does give rise to such rights. To say that the public policy of the member state prevent the granting of the ordinary remedy of damages in the case of breach of an article of the Treaty would be straight away to provide for the individual rights under the Treaty a protection inferior to that provided by domestic law for breach of a comparable domestic statute (i.e. one conferring similar rights), for the concept of the co-existence of a domestic statute enacted by Parliament to confer rights of enforcement on individuals and a public policy which prevents the enforcement on individuals and a public policy which prevents the enforcement of the very rights which Parliament has conferred involves a contradiction in terms.

It may be said, then, Oliver LJ's judgment centred on the requirement, imposed on national courts by EC law, to ensure an effective protection of individuals' rights deriving from EEC law.

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<sup>160</sup> Note 145 at 770-771.



The plaintiffs lodged an appeal with the House of Lords against the majority judgment of the Court of Appeal. However, the proceedings were settled before the appeal was heard.<sup>161</sup>

In their judgments, all three members of the Court of Appeal were concerned about the undesirability of Ministers being unduly hampered in the exercise of their powers by the prospect of claims for damages should they subsequently be held to have acted unlawfully, albeit in good faith.

It has been contended<sup>162</sup> that the respective decisions of the majority and the minority in *Bourgoin*, although irreconcilable and opposed, are both correct from the standpoint of Community law. The ECJ has not expressly stated that an action in private law for damages must be available in national courts for mere breach of the EEC Treaty. On the authority of its decision in *Salgoil*,<sup>163</sup> the ECJ is not prepared to categorise Community rights as either private or public rights under English law - such a matter is left for the national courts to determine, on the assumption that the categorisation chosen should permit the effective protection of Community rights. In several previous ECJ judgments,<sup>164</sup> it has been insisted that the protection afforded to individuals vested with rights should be identical to that

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<sup>161</sup> Written answer of Mr Jopling: *Hansard*, 23rd July 1986 - Vol 102, No 156. Under the settlement the plaintiffs received some £3.5m. from the defendant.

<sup>162</sup> Green & Barav, *loc. cit.* at 112.

<sup>163</sup> Case 13/68 *Salgoil SpA v. Italian Ministry for Foreign Trade* [1968] ECR 453.

<sup>164</sup> See e.g. Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805 and *supra* at 14.

offered to private litigants in similar cases arising in the domestic context.

Therefore, the argument continues,<sup>165</sup> the majority of the Court of Appeal held that the infringement of EEC Art 30 by the Agriculture Minister could only be subject to judicial review and, as will be seen,<sup>166</sup> an action for damages in private law would only lie in the case of an abuse of power. According to the majority, the ECJ's approach to the question of the Community's own liability for unlawful action supported this point.

The minority judgment of Oliver LJ in *Bourgoin* was justified by the duty imposed on national courts to afford an immediate and effective protection to individuals on whom Community law confers enforceable rights. It has been suggested<sup>167</sup> that as the delay involved in an application for judicial review and the lack of any interim relief against the Crown<sup>168</sup> would be tantamount to denying the effective protection of such rights, the learned Lord Justice pronounced in favour of an action in damages in private law for breach of statutory duty.

It is submitted that although one might be inclined to accept the conclusion of Oliver LJ, the logic of his approach being beyond question, it is difficult to refute Parker LJ's argument on the "double standard" which would result from the

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<sup>165</sup> Green & Barav, *loc. cit.* at 113.

<sup>166</sup> See *infra* at 110.

<sup>167</sup> Green & Barav, *loc. cit.* at 108.

<sup>168</sup> Due to the Crown Proceedings Act 1947, s21. But see *supra* at 79.

acknowledgment of the liability of national public authorities for a mere breach of Community law whereas in similar circumstances the Community will not be held liable.

The decision of the majority of the Court of Appeal was followed in *An Bord Bainne Co-operative Ltd v. Milk Marketing Board*.<sup>169</sup> The plaintiff sued the defendants for an injunction and damages arising out of the latter's dual pricing policy for the sale of butter respectively to the public and for intervention storage, contrary to EEC Reg 1422/78. The third defendant, the Dairy Trade Federation, applied for the Ministry of Agriculture, Fisheries & Food to be joined as third party.<sup>170</sup>

The ground on which the Federation claimed damages against the Minister was that he failed to take the measures necessary to ensure that the defendants (including themselves) complied with EC law and made them breach art 10(1) of EC Reg 1422/78. In so far as the Minister owed a statutory duty to the Federation under art 10(1) to ensure their compliance with it and was in breach of that duty, the Federation claimed damages.

The High Court (Steyn J) refused the Federation leave to join the Minister as third party.

On appeal, the Federation submitted *inter alia* that (a) art 10(1) had direct effect; and (b) the *ratio decidendi* of *Bourgoïn* was that there could be no claim for damages against the government for taking or failing to take legislative or

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<sup>169</sup> [1988] 1 CMLR 605.

<sup>170</sup> Leave being necessary for the issue of a third party notice for service on the Crown by virtue of RSC Ord 77, r10.

quasi-legislative action. But art 10(1) imposed a duty to take *administrative* action, not legislative action, to ensure compliance with EC law; for breach of that duty, an individual who had suffered damage could recover damages as for breach of any other statutory duty, irrespective of negligence or misfeasance in public office. *Bourgoin* could be distinguished because it was concerned with legislative or quasi-legislative action only.

The Court of Appeal (Lloyd and Nourse LJ and Sir Roualeyn Cumming-Bruce) dismissed the appeal, holding *inter alia* that even if EEC Reg 1422/78, art 10(1) were directly effective, *Bourgoin* was not distinguishable from the present case and therefore the application would be refused. Accepting the conclusion reached by Parker LJ in *Bourgoin*<sup>171</sup> that a breach of EEC Art 30 by the UK government was not to be regarded as of the nature of a breach of statutory duty in English law and thus did not sound in damages, Lloyd LJ concluded:<sup>172</sup>

It goes without saying that we in this Court are bound by the decision of the majority in *BOURGOIN*. But how far does the decision go? Can it be distinguished as the [Federation] submits? The decision itself, relating as it did to the granting and withdrawal of a licence under subordinate legislation, leaves me in no doubt that the *ratio decidendi* of *BOURGOIN* covers administrative acts in the sphere of public law as well as legislative and quasi-legislative acts.

Consequently, the remedy for ministerial action or inaction lay in public law by way of judicial review and not by way of a claim for damages for breach of statutory duty.

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<sup>171</sup> [1986] QB 716 at 788.

<sup>172</sup> Note 169 at 616.

In the wake of the House of Lords' decision in *Garden Cottage Foods*, it was considered that the tort of breach of statutory duty would be the main weapon at the disposal of litigants seeking damages for loss occasioned by a breach of EC law. The majority judgment in *Bourgoin* and the one in *An Bord Bainne*, however, confine the use of that tort to provisions of a private law nature. For "public law provisions," breach of statutory duty becomes irrelevant. Instead, the tort of misfeasance in public office, as will be shown below, is to be called upon to play a prominent role.

(d) Misfeasance in public office

This private law tort is concerned solely with public authorities and is designed to afford a remedy in damages for misfeasance or malicious use (or abuse) of power by public authorities or officers. The classic English statement of the tort is that of Best CJ in the case of *Henly v. Mayor and Burgesses of Lyme*:<sup>173</sup>

Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them.

It is clear, however, that the public officer is not liable unless he acts "maliciously."<sup>174</sup>

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<sup>173</sup> (1828) 5 Bing 91 at 107; 130 ER 995 at 1001.

<sup>174</sup> See *Tozer v. Child* (1857) 7 El & Bl 377; 119 ER 1286.

Although a long-established tort,<sup>175</sup> it is only through recent case law that its content has begun to be defined.<sup>176</sup> These decisions have indicated that damages will not be awarded against public authorities merely because they have made some order which turns out to be *ultra vires* unless there is an element of conscious or malicious abuse.

In *Dunlop v. Woollahra Municipal Council*,<sup>177</sup> an Australian local authority passed resolutions restricting building on a particular site without giving notice and fair hearing to the landowner, and also in conflict with the planning ordinance. The Privy Council rejected the owner's claim for damages for depreciation of his land in the interval before the resolutions were held to be invalid and stated:<sup>178</sup>

... in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such "misfeasance" as is a necessary element in this tort.

This *dictum* suggests alternative prerequisites, viz. malice in the strict sense or knowledge of invalidity of the act in question, as necessary elements of the tort.<sup>179</sup>

The decision in the *Dunlop* case was relied on by the Divisional Court in *R v. Environment Secretary, ex parte*

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<sup>175</sup> Mentioned in the case of *Ashby v. White* (1703) 2 Ld Raym 938, 3 Ld Raym 320; 92 ER 126, 92 ER 710. For fuller discussion on this point, see Wade, *op. cit.* at 777-778.

<sup>176</sup> Malice was defined as "simply acting for a reason and purpose knowingly foreign to the administration" - *Roncarelli v. Duplessis* (1959) 16 DLR (2d) 689 at 706 per Rand J.

<sup>177</sup> [1982] AC 158.

<sup>178</sup> Note 177 at 172.

<sup>179</sup> See Wade, *op. cit.* at 780-782.

*Hackney LBC*,<sup>180</sup> which held that a mere breach of statutory duty by the Minister could not give rise to a claim for damages in proceedings for judicial review. May LJ stated:<sup>181</sup>

In the circumstances of this case such a claim could only be made good if the borough could at least show malice or knowledge by the Secretary of State on the invalidity of one or other of his decisions.

The New Zealand case of *Takaro Properties Ltd v. Rowling*<sup>182</sup> concerned a company that sought damages as a result of a Minister's refusal of permission to allow it to obtain finance from a Japanese business. The Minister's refusal was later quashed as *ultra vires* but the claim failed since it was held that this alone was not a cause of action.<sup>183</sup> Moreover, the House of Lords in *Calveley v. Chief Constable of Merseyside Police*<sup>184</sup> held that for the tort of misfeasance in public office to be proved, it had to be shown at least that a public officer had done in bad faith or, possibly, without reasonable cause an act in the exercise or purported exercise of some power or authority with which he was clothed by virtue of the office he held.

There was further discussion of the tort in *Jones v. Swansea CC*.<sup>185</sup> In that case, the Court of Appeal noted<sup>186</sup>

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<sup>180</sup> [1983] 1 WLR 524.

<sup>181</sup> Note 180 at 539.

<sup>182</sup> [1978] 2 NZLR 314.

<sup>183</sup> Note 182 at 317; at 328-329; at 338-340.

<sup>184</sup> [1989] 2 WLR 624.

<sup>185</sup> [1984] 3 All ER 162.

<sup>186</sup> Note 185 at 173.

that the lower court had defined "malice" as meaning that the act was done with the objective of injuring the plaintiff;<sup>187</sup> and that malice, in the sense of an intent to injure, and knowledge by the doer that he had no power to do the act complained of were merely alternative, and not cumulative, ingredients of the tort.<sup>188</sup>

The Court of Appeal stated<sup>189</sup> that it was the abuse of a public office which gave rise to the tort of misfeasance and that all powers possessed by a public authority, whatever their nature or origin, could only be exercised for the public good. Consequently, it held that there was no reason why a decision taken by the holder of a public office, in his or its capacity of such holder, with intent to injure another or with knowledge that the decision was *ultra vires* should be incapable of giving rise to an action in tort for misfeasance merely because the decision was taken in the exercise of a power conferred by a contract and had no public element. The plaintiff would accordingly have a good cause of action if malice on the part of the council were to be established.

The tort of misfeasance in public office has, in fact, been discussed within the context of EC law before the English courts.

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<sup>187</sup> This definition had implicitly been accepted by both parties.

<sup>188</sup> See discussion of *Bourgoin supra* at 97ff.

<sup>189</sup> Note 185 at 174-175.



(e) Damages for misfeasance in the EC context

In *Bourgoin SA v. Ministry of Agriculture, Fisheries & Food*,<sup>190</sup> it was held that damages could be claimed if it could be shown that the Minister had abused his power, well knowing that the order he had made, withdrawing the plaintiffs' licence, was in breach of EEC Art 30 and would injure the plaintiffs' business.

Before the High Court (Mann J), the plaintiffs claimed damages, alleging *inter alia* that the withdrawal of the licence had amounted to misfeasance in public office in that the defendant had exercised its power to withdraw the licence for a purpose which, as it had known, was contrary to EEC Art 30; was calculated to, and did, damage unlawfully the plaintiffs; and was not the purpose for which those powers had been conferred on the defendant.

In holding that the plaintiffs' claim for damages for misfeasance in public office disclosed a cause of action, Mann J stated,<sup>191</sup> that none of the cases to which he was referred precluded the commission of the tort where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it did. The learned judge continued:<sup>192</sup>

I read the judgment in *Dunlop v. Woollahra Municipal Council* ... in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has

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<sup>190</sup> [1986] QB 716. The facts are set out *supra* at 97-98.

<sup>191</sup> Note 190 at 735-740.

<sup>192</sup> Note 190 at 740.

no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A and, accordingly, I determine that paragraphs 23 and 26 of the amended statement of claim do disclose a cause of action.

It has been argued<sup>193</sup> that there are valid reasons for distinguishing between these two situations. A defendant who knowingly commits an *ultra vires* act is undoubtedly culpable but his culpability *vis-à-vis* the plaintiff is greatly increased by the presence of malice. The requirement of an intention to injure the plaintiff acts as a valuable control on the defendant's liability. Many *ultra vires* acts are of a "legislative" nature foreseeably affecting the economic interest of a large and indeterminate class.<sup>194</sup> This reasoning, coupled with the UK courts' apparent determination to confine liability in the economic torts to intentionally inflicted damage,<sup>195</sup> is even more persuasive in the sphere of public liability where the taxpayer picks up the bill.

On appeal, the Court of Appeal upheld the lower court's decision on this point and accepted that no sensible distinction could be drawn between the two cases mentioned by the learned judge. Oliver LJ (with whom Parker and Nourse LJJ concurred on this point) therefore accepted the twin

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<sup>193</sup> Steiner, *loc. cit.* at 113.

<sup>194</sup> e.g. An embargo on imports as in *Bourgoin*.

<sup>195</sup> See e.g. *Lonrho v. Shell Petroleum Co* [1981] 3 WLR 33; *RCA Corp v. Pollard* [1982] 3 WLR 1007.

Accordingly<sup>199</sup> where a minister deliberately breaches a directly effective EEC Treaty provision in the knowledge that injury will thereby be caused to another party, that party is entitled to claim damages for misfeasance in public office. Where, however, the Minister acts in good faith but in breach of the Treaty, a person suffering loss as a result has no claim against him for breach of statutory duty - his only remedy lies in the realm of public law.<sup>200</sup>

One obvious drawback to be found in the case of the tort of misfeasance in public office, it is submitted,<sup>201</sup> is that it depends upon proof of a mental element, viz. malice, widely construed to connote spite or ill-will (narrow malice) and/or knowledge of the *ultra vires* nature of the challenged act. This may well have the effect of making successful claims infrequent since it may prove difficult to establish to a court's satisfaction that a Minister has acted in bad faith - although in *Bourgoïn*, the ECJ did find that the purpose of the UK government's action was to block turkey imports for commercial reasons rather than on health grounds, their ostensible justification. In fact, it might be questioned whether the Court of Appeal did not, in fact, impose stricter conditions for liability when compared with those of the ECJ.<sup>202</sup>

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<sup>199</sup> Arnall & Holyoak, 'United Kingdom: National remedies restricted' (1985) 10 EL Rev 476 at 476-477.

<sup>200</sup> For statutory duty, see *supra* at 85; for public law remedies, see *infra* at 117.

<sup>201</sup> Green & Barav, *op. cit.* at 112.

<sup>202</sup> The breach must be "sufficiently serious" and amount to a "grave and manifest disregard (on the part of the defendant institution) of the limits on its powers": Joined Cases 83 and

(5) JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(a) The Prerogative Orders

These remedies have long been used for the control of governmental duties and powers. They are granted at the suit of the Crown and are called "prerogative" because at one time they were available only to the Crown and not to the subject. The Crown, by obtaining court orders in the form of certiorari, prohibition and mandamus could ensure public authorities carried out their duties and that inferior tribunals did not exceed their jurisdiction. Over the centuries, these prerogative powers of the Crown have evolved and now form the machinery for the protection of the subject *vis-à-vis* public authorities.

All these remedies now issue from the High Court and must still be sought by a special form of procedure.<sup>203</sup> Moreover, they are all discretionary and the court may withhold them if it thinks fit, so that even if it were to find some act to be unlawful it could still refuse to intervene. Discretion will not be exercised in the litigant's favour, for example, if he has been guilty of undue delay in raising his objection,<sup>204</sup> or if his conduct has been unmeritorious<sup>205</sup> or

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94/76, 4, 15 and 40/77 *HNL v. EC Council* [1978] ECR 1209. Further the breach must be "verging on the arbitrary": Cases 116 and 124/77 *Amylum v. Council and Commission* [1979] ECR 3447.

<sup>203</sup> See *infra* at 120.

<sup>204</sup> *R v. Stafford Justices, ex parte Stafford Corp* [1940] 2 KB 33.

<sup>205</sup> *Windsor & Maidenhead RBC v. Brandrose Investments Ltd* [1983] 1 WLR 509; *R v. Education & Science Secretary, ex parte Birmingham CC* (1984) 83 LGR 79.

unreasonable,<sup>206</sup>, or where the public authority in question has done all that is reasonably can to fulfill its duty.<sup>207</sup> Where it would not be in the interests of justice, the court always retains discretion to withhold the grant of the remedy.

The first two remedies, certiorari and prohibition, are raised for the control of powers while the third, mandamus, is the primary remedy for enforcing public duties.

(i) Certiorari

Certiorari is an order originally issued to an inferior tribunal to have the record of proceedings reviewed in the High Court and if the decision of such tribunal were *ultra vires* or vitiated by error on the face of the record, it was quashed, *i.e.* it was declared completely invalid. The scope of the remedy now extends to control the decisions of any body, including Ministers, having "legal authority to determine questions affecting the rights of subjects"<sup>208</sup> on the basis that the determination of such questions in itself imposes the duty to act judicially.

(ii) Prohibition

This order originally lay to prevent an inferior tribunal from taking a decision in excess of its jurisdiction or

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<sup>206</sup> *Ex parte Fry* [1954] 1 WLR 730.

<sup>207</sup> *R v. Bristol Corp, ex parte Hendy* [1974] 1 WLR 503.

<sup>208</sup> *R v. Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205, *per* Atkin LJ.

infringing the rules of natural justice.<sup>209</sup> It has also been extended to cover administrative bodies including Ministers.<sup>210</sup> Prohibition developed alongside certiorari and is a similar remedy but its effect is prospective rather than retrospective. In *R v. Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd*,<sup>211</sup> Aitkin LJ said:<sup>212</sup>

I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

In a case in which the litigant sought to prevent a local authority from licensing indecent films, Lord Denning MR stated:<sup>213</sup>

[Prohibition] is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licenses which permit conduct which is contrary to law.

Certiorari and prohibition may be used together - the former to quash the decision and the latter to restrain its execution. Even if a litigant were to apply solely for prohibition to prevent the enforcement of an *ultra vires* decision, the effect of such an order would be the same as if

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<sup>209</sup> For natural justice, see generally Wade, *op. cit.* at 465-579.

<sup>210</sup> *R v. Health Minister, ex parte Davis* [1929] 1 KB 619.

<sup>211</sup> [1924] 1 KB 171.

<sup>212</sup> Note 208 at 206.

<sup>213</sup> *R v. GLC, ex parte Blackburn* [1976] 1 WLR 550 at 559.

certiorari had been granted to quash it - the reason being that the court must necessarily declare its invalidity before prohibiting its enforcement.

(iii) Mandamus

The third order, mandamus, may be issued against any public body, including a Minister,<sup>214</sup> to require it or him to carry out a public duty. Within the field of public law the scope of mandamus is wide and the court may use it freely to prevent breach of duty and injustice. As Darling J pointed out in *R v. Hanley Revising Barrister*:<sup>215</sup>

Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.

As Wade has said:<sup>216</sup> "Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. The prerogative remedies thus together cover the field of governmental powers and duties."

(b) Application for Judicial Review

(i) Introduction

Until recently, the prerogative orders had to be sought by a public law procedure while an injunction or damages could only be sought in an ordinary, private law action.

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<sup>214</sup> *Padfield v. Minister of Agriculture, Fisheries & Food* [1968] AC 997.

<sup>215</sup> [1912] 3 KB 518 at 529.

<sup>216</sup> Wade, *op. cit.* at 649.

This anomaly was removed in 1977 by the Rules of the Supreme Court, Ord 53<sup>217</sup> which provided for a comprehensive procedure called "an application for judicial review." The basis for the reformed procedure was laid down in the Supreme Court Act 1981, s31:

- (1) An application to the High Court for one or more of the following forms of relief, namely-
  - (a) an order of mandamus, prohibition or certiorari;
  - (b) a declaration or injunction under subsection (2); or
  - (c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

- (2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to -

- (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
    - (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
    - (c) all the circumstances of the case,
- it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

- (3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

- (4) On an application for judicial review the High Court may award damages to the applicant if -

- (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and
  - (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.

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<sup>217</sup> A number of provisions of RSC Ord 53 were given statutory force by the Supreme Court Act (c54) 1981.



As a consequence, this procedure *must* be used on an application for any of the prerogative orders and may be used, *inter alia*, for an injunction or damages. An application for judicial review is not in itself a remedy but a procedure for seeking one or more of the long-established remedies, which still have their own limits. Accordingly, the scope of judicial review is still determined by the rules which govern the various remedies rather than by the procedure for obtaining them. As Lawton LJ said:<sup>218</sup> "The purpose of s.31 is to regulate procedure in relation to judicial review, not to extend the jurisdiction of the court."

Although all the remedies mentioned are made interchangeable by being made available "as an alternative or in addition" to any of them,<sup>219</sup> neither injunction nor declaration nor damages can be claimed unless one of the prerogative remedies also could have been sought.<sup>220</sup>

(ii) *Locus standi*

The new RSC Ord 53 provides: " The Court shall not grant leave unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates."

For the purposes of judicial review, then, standing is made a "threshold question," *i.e.* it is to be determined at the stage of the initial *ex parte* application for leave. At such point, the court can reject persons with no interest at

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<sup>218</sup> *Law v. National Greyhound Racing Club Ltd* [1983] 1 WLR 1302 at 1308.

<sup>219</sup> RSC Ord 53, r2; Supreme Court Act 1981, s31.

<sup>220</sup> *Davy v. Spelthorne BC* [1984] AC 262 at 277-278.

all or no sufficient interest<sup>221</sup> and thereby prevent abuse of the procedure by busybodies, cranks and other mischief-makers.<sup>222</sup> The test is therefore a broad one, designed to turn away futile or frivolous applications only.

In addition, the rule requires that the interest is to be "in the *matter* to which the application relates," thereby suggesting that standing is to be related to the facts of the case rather than (as previously) to the particular remedy sought: one uniform test ought to apply to all remedies alike whether prerogative orders or injunctions or declarations.

This seems to have been confirmed in *R v. IRC, ex parte National Federation of Self-Employed & Small Businesses Ltd*<sup>223</sup> in which the House of Lords gave a new and liberal character to the law of standing.

The Inland Revenue had agreed to grant a tax amnesty to a group of casual workers who together had previously evaded income tax to the tune of about £1m. a year. The agreement provided *inter alia* that, subject to certain conditions, investigations into tax lost in previous years would not be carried out.

A federation, representing the self-employed and small business, objected to the different attitude taken by the IRC *vis-à-vis* the tax evasions of that group of workers with that adopted by the Revenue in other cases where tax evasions were suspected. Consequently, the federation applied for judicial review under RSC Ord 53 and claimed a declaration that the IRC

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<sup>221</sup> [1982] AC 617 at 630, *per* Lord Wilberforce.

<sup>222</sup> Note 221 at 653, *per* Lord Scarman.

<sup>223</sup> [1982] AC 617.

acted unlawfully in granting the amnesty and an order of mandamus directed to the Revenue to assess and collect income tax from the workers.

The House of Lords held that, having regard to the nature of "the matter" raised, the federation merely as a body of taxpayers had shown no sufficient interest in that matter to justify its application for relief. The federation had failed to show that (a) any conduct of the Revenue was *ultra vires* or unlawful; or (b) any grounds for believing that the Revenue had failed to do its statutory duty.

In its decision, the House made the testing of an applicant's standing a two-stage process:

(i) at stage one, on the application for leave, the test is designed to turn away hopeless or meddlesome applications only;

(ii) at stage two, when the matter comes to be argued, the test is whether the applicant can show a strong enough case on the merits, judged in relation with his own concern to it. As Lord Diplock put it:<sup>224</sup>

If, in the instant case, what at the threshold stage was suspicion only had been proved at the hearing of the application for judicial review to have been true in fact (instead of being utterly destroyed), I would have held that this was a matter in which the federation had a sufficient interest in obtaining an appropriate order, whether by way of declaration or mandamus, to require performance by the board of statutory duties which for reasons shown to be *ultra vires* it was failing to perform.

It has been suggested<sup>225</sup> that the second-stage test is not a test of standing but rather one of the merits of the

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<sup>224</sup> Note 223 at 644; a similar view was put by Lord Scarman *ibid.* at 655.

<sup>225</sup> Wade, *op. cit.* at 703.

case. Since the essence of standing is that an applicant with a good case on the merits may still have insufficient interest to be allowed to pursue it, the House of Lords' new criteria would seem virtually to abolish the requirement of standing in this sense. Consequently, however remote the applicant's interest, he may still succeed if he shows a clear case of default or abuse. The law will now focus on public policy rather than private interest.<sup>226</sup>

(iii) The dichotomy of public law and private law

In its *Report on Remedies in Administrative Law*,<sup>227</sup> the Law Commission emphasised that they did not intend any reformed procedure for judicial review to be exclusive.<sup>228</sup> Indeed one of the Law Commission's main objects was to allow a litigant to seek declarations, injunctions and damages together with the prerogative remedies within the same procedure but not to deprive such litigant of the choice in procedures which he had previously enjoyed.

The new procedure of an application for judicial review resulted, however, in two distinct procedures by which a litigant could seek a declaration or an injunction or damages within the field of public law. On the one hand, under RSC Ord 53, the litigant had to obtain leave of the court within a very short time limit and in which procedure oral evidence,

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<sup>226</sup> *R v. Boundary Commission for England, ex parte Foot* [1983] QB 600; *R v. HM Treasury, ex parte Smedley* [1985] QB 657; *R v. Attorney-General, ex parte Imperial Chemical Industries PLC* [1987] 1 CMLR 72; *R v. Felixstowe Justices, ex parte Leigh* [1987] QB 582.

<sup>227</sup> Law Commission No 83 Cmnd 6407 (1976).

<sup>228</sup> Note 227 para. 34 at 16-17.

in the form of cross-examination on affidavits, would not generally be used thereby making it a less suitable form of proceeding for determining purely factual issues; while on the other hand, by ordinary action, the litigant was free from these restraints.<sup>229</sup>

Such differences were highlighted in the seminal judgment of the House of Lords in *O'Reilly v. Mackman*,<sup>230</sup> where the plaintiffs sought to use the alternative procedure of declaration by way of ordinary action to establish that a decision of the Hull Prison Board of Visitors was null and void for having failed to observe the rules of natural justice.

The proceedings arose out of riots at the prison in 1976 but it was not until a 1978 decision of the Court of Appeal<sup>231</sup> that it was established that disciplinary proceedings of a prison board of visitors was subject to the rules of natural justice. By then the period within which prerogative relief must be applied for had elapsed but not the ordinary six-year limitation period for civil proceedings. The issue was, therefore, whether the prisoners could seek a declaration by writ or originating summons as had been done previously against public authorities<sup>232</sup> or whether, because of the new RSC Ord 53 procedure, such proceedings were now

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<sup>229</sup> Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34.

<sup>230</sup> [1983] 2 AC 237.

<sup>231</sup> *R v. Hull Prison Board of Visitors, ex parte St Germain* [1979] QB 425.

<sup>232</sup> *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147; *Ridge v. Baldwin* [1964] AC 40.

contrary to public policy and could be struck out as an abuse of the process of the court.

In the speech delivered by Lord Diplock and concurred with by his colleagues, his Lordship acknowledged that neither the Supreme Court Act 1981, s31 nor RSC Ord 53 expressly provided that an application for judicial review was to be the exclusive procedure by which declarations or injunctions might be obtained for infringing rights protected by public law. The variation between cases made it proper to rely on the inherent power of the court, exercised on a case-to-case basis, to prevent abuse of its process whatever might be the form taken by that abuse. It was not wise for the House of Lords, he said, to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that were entitled to protection in public law. He continued:<sup>233</sup>

Now that [the old procedural] disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be invoked, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

This decision sought to ensure that the application for judicial review was to be used exclusively in public law

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<sup>233</sup> Note 230 at 285.

cases.<sup>234</sup> Subsequent case law has established<sup>235</sup> that because the prerogative orders may only be obtained by way of application for judicial review and because such procedure is available only in the context of public law, the prerogative remedies are not available in a situation governed by private law - e.g. a dispute with a public authority employer arising out of a contract.<sup>236</sup>

On the other hand, whilst the use of the application for judicial review is treated not merely as being available but as being obligatory to obtain a declaration, an injunction or damages in the context of public law, these remedies may also be available subject to rules governing common law actions if the subject-matter relates to private law.<sup>237</sup> Hence the distinction between public law and private law is particularly important with regard to the exercise of these remedies.

#### (c) Judicial Review and EC law

In cases where the defendant is a public body performing a public function (or failing to do so) in breach of EC law and there is no infringement of the plaintiffs' private law rights, the appropriate remedy will therefore be an application for judicial review. This has been sought in a

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<sup>234</sup> See comment of Beatson, *loc. cit.* at 39.

<sup>235</sup> *Cocks v. Thanet DC* [1983] 2 AC 286; *Council of Civil Service Unions v. Minister of Civil Service* [1984] 1 WLR 1174; and *Law v. National Greyhound Racing Club Ltd* [1983] 1 WLR 1302.

<sup>236</sup> *R v. BBC, ex parte Lavelle* [1983] 1 All ER 241.

<sup>237</sup> *Davy v. Spelthorne BC* [1984] AC 262.

large number of cases of which the following are merely examples.<sup>238</sup>

*R v. Home Secretary, ex parte Santillo*<sup>239</sup> concerned the deportation of an Italian national. He had been convicted of various crimes and sentenced to eight years' imprisonment with a recommendation for deportation. Some four and a half years after conviction and on the basis of evidence from the prison medical officer that Santillo would be likely to commit similar offences in the future, the Home Secretary acted on the trial judge's recommendation and ordered Santillo to be deported to Italy. No reasons other than the recommendation were given for the order.

Santillo applied for an order of certiorari to quash the deportation order on the ground that it infringed EEC Dir 64/221, art 9(1). The directive limited the power of a Member State to deport EC nationals and by art 9(1) provided that before the administrative authority of a Member State ordered deportation it had first to obtain the "opinion" of an independent "competent authority."

The defendant submitted, *inter alia*, that (a) the recommendation of the trial judge did not qualify as such an "opinion" and even if it did, it had been given four and a half years before the deportation order and therefore a further opinion ought to have been ordered; and (b) the Home Secretary had breached the rules of natural justice in not disclosing to the defendant all the information available to

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<sup>238</sup> Although not dealt with in this study, the declaration has been widely used in this context: see Vaughan, *Law of the European Communities* Vol 1 at 452-453 (1986).

<sup>239</sup> [1981] 2 All ER 897.



the Minister on which the decision to order the defendant's deportation was made.

The Divisional Court, after making a reference to the ECJ,<sup>240</sup> refused to grant the order sought.

On further appeal, the Court of Appeal held that (i) not only was the trial judge's recommendation the "opinion" of a competent authority but also the lapse of four and a half years in making the deportation order was insufficient to deprive the recommendation of its function as an opinion since no new factors had arisen to invalidate it; and (ii) the applicant had not been denied natural justice because there was no absolute duty on the Home Secretary when exercising his power of acting on a deportation recommendation to disclose to the person concerned all the information available to the Minister. Consequently, Santillo's appeal against the Divisional Court's refusal to grant an order of certiorari to quash the deportation order would be dismissed.

Certiorari was also sought in *R v. ILEA, ex parte Hinde*.<sup>241</sup> A French national and two Irish nationals all applied for local authority grants in England to pursue courses, two for teacher training and one for a law degree. In all three cases, the application for a grant was refused on the ground that they had not been resident in the United Kingdom for the requisite three years prior to the start of the course.

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<sup>240</sup> Case 131/79 *R v. Home Secretary, ex parte Santillo* [1980] ECR 1585.

<sup>241</sup> [1985] 1 CMLR 716.

As a result, they applied for orders of certiorari seeking to quash the decisions of the local authorities on the ground that they had been denied their EC rights, under EEC Reg 1612/68, art 7(3), as Community nationals to "have access to training in vocational schools and retraining centres" under the same conditions as national workers.

The Queen's Bench Division (Taylor J)<sup>242</sup> held that (i) the definition covered professional training as well as that for manual jobs and covered vocational courses offered by an establishment which was not exclusively concerned with vocational training: this therefore covered the teacher training courses. Since the three-year residence rule was discriminatory for courses covered by art 7(3) and therefore inapplicable, certiorari would be granted to quash the refusal of grants to the two applicants for teacher training courses; but (ii) as the law degree was not a vocational course and accordingly was not covered by art 7(3) no order for certiorari would be made in respect of the application and the refusal of grant to that applicant was confirmed.

The use of injunctions in the application for judicial review procedure arose in *R v. Transport Secretary, ex parte Factortame Ltd.*<sup>243</sup> The applicants in that case, Spanish fishermen, sought interim relief to suspend the operation of the discriminatory part of a statute<sup>244</sup> pending determination of its compatibility with EC law by the ECJ.

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<sup>242</sup> Note 241 at 723-726.

<sup>243</sup> For a fuller discussion of this case, see *supra* at 79.

<sup>244</sup> Part II of the Merchant Shipping Act 1988.

The Divisional Court held<sup>245</sup> that the fishermen were entitled to the interim relief sought. The Court of Appeal reversed the decision<sup>246</sup> on the grounds that under national law such relief could not be granted against an Act of Parliament.

The House of Lords found<sup>247</sup> that the claim by the applicants that they would suffer irreparable damage if interim relief were not granted was well founded. Their Lordships agreed with the Court of Appeal, however,<sup>248</sup> that the English courts had no power to grant interim relief against the Crown or its Ministers because of the provisions of the Crown Proceedings Act 1947, s21.

The issue whether the Spanish fishermen were entitled to interim protection was referred to the ECJ by the House of Lords. In its ruling,<sup>249</sup> the ECJ held that interim relief should be available to individuals to protect EC rights (even if they were only putative ones) pending final determination by the ECJ of the legality of the statute although such relief could not be obtained in national law.

Consequently, in order to render the protection of individuals' EC rights effective, the English courts may now grant an interim injunction against the Government in an

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<sup>245</sup> [1989] 2 CMLR 353.

<sup>246</sup> Note 245 *ibid*.

<sup>247</sup> [1989] 2 WLR 997 at 1010.

<sup>248</sup> Note 247 at 1020-1021.

<sup>249</sup> Case C-213/89, *The Times* 20th June 1990.

application for judicial review, despite the wording of the 1947 Act.<sup>250</sup>

In conclusion it may be said that Community law has provided "a most welcome catalyst"<sup>251</sup> to gradual developments that have been at work for decades in English administrative law, opening up new possibilities for judicial review.

Accordingly, the availability of certiorari may be used by an EC national for example to quash (a) an order of a Minister seeking to deport him on grounds contrary to EC law;<sup>252</sup> (b) a decision of a local authority denying his EC right to access to vocational training on the same basis as a UK worker;<sup>253</sup> or (c) the revocation of a licence to import foodstuffs as being contrary to EEC Arts 30 and 34.<sup>254</sup> The remedy has therefore been used to control the decisions of any body of persons having legal authority to determine the rights of nationals, including Ministers, on the basis that the determination of such questions in itself imports the duty to act judicially, e.g. not to act in breach of directly effective EC law.

Since prohibition has also been extended to cover administrative bodies, it could presumably be used to prevent a prospective breach of an enforceable Community right.

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<sup>250</sup> See e.g. Barav, 'Interim relief and English courts' (1990) 140 New LJ 898.

<sup>251</sup> Oliver, 'Enforcing Community Rights in the English Courts' (1987) 50 MLR 881 at 906.

<sup>252</sup> *Santillo: supra* at 129.

<sup>253</sup> *Hinde: supra* at 130.

<sup>254</sup> *Bourgoin: supra* at 97.

The third order, mandamus, may be sought to require a Minister (or public authority) to carry out a public duty. It may therefore be of assistance in requiring a Minister to grant a licence which has previously been refused on grounds contrary to EC law.

The problem which existed where the applicant sought interim relief - in the form of an interim injunction - against the Crown or its servants has now been resolved.<sup>255</sup> In appropriate cases, therefore,<sup>256</sup> where a court is concerned with the enforcement of Community rights and where damages will not be available to a successful litigant for the period prior to the court's determination, the principle of effectiveness in EC law requires interim relief to be available. On that basis, Community law now overrides the provisions of the Crown Proceedings Act 1947, s21 in this respect.

It may therefore be considered that in a public law action, the award of the prerogative orders combined with interlocutory injunctions have proved to be effective interim and final remedies for the protection of EC rights against violation by the Government and other public authorities.

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<sup>255</sup> *Factortame*: *supra* at 131.

<sup>256</sup> *Oliver*, *loc. cit.* at 904-905.

## CHAPTER THREE

### REMEDIES FOR BREACH OF EC LAW BY PUBLIC AUTHORITIES:

#### FRANCE

##### (1) INTRODUCTION

##### (a) The relationship of French law and EC law

Under the terms of art 55 of the Constitution of the Fifth Republic (1958),<sup>1</sup> duly ratified treaties are given an authority higher than that of statute, on condition that they have been respected by France's treaty partners:

Leur traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.

*Lois* (statutes) are one of the two forms of legal measures provided for by the Constitution. Under art 34, on a closed list of matters, *lois* fall within the sole legislative ambit of Parliament. Before enactment they may be challenged before the Conseil constitutionnel.<sup>2</sup> But once enacted and

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<sup>1</sup> Like arts 26 and 28 of the Constitution of the Fourth Republic (1946).

<sup>2</sup> Under the 1958 Constitution, the Conseil constitutionnel or "Constitutional Council" was given certain functions including, *inter alia*:

(i) under art 61(1), to express an opinion, prior to their promulgation, on the legality under the Constitution of all *lois organiques* approved by Parliament.

(ii) under arts 61(2) and 54, if an ordinary *loi* or international treaty is challenged as contrary to the Constitution, to decide upon its constitutionality again prior to its promulgation or ratification.

Exceptionally *lois* may be subject to post-promulgation review on the occasion of modifying, supplementing or implementing legislation: *Etat d'urgence en Nouvelle-Calédonie*, Con constit 25 janvier 1985, Rec 43.

promulgated, the ordinary courts (whether civil or administrative) have no power to question their constitutionality. By art 37, it is provided that all matters not listed in art 34 shall fall exclusively within the regulatory power of the executive, i.e. the power to make *règlements* (regulations), the other form of legal measure. A *règlement* is classified as an administrative act and is therefore always subject to the jurisdiction of the Conseil d'Etat and the administrative courts.

Returning to art 55, this provision introduces international law into internal law *de plano* without intervention by the national legislator. There is good reason to specify that art 55 aims not only at treaties themselves but also at international acts taken for their application. Thus, as far as Community law is concerned, it is not only the directly enforceable part of the EEC Treaty which is introduced into French law - but also the acts taken for its application which themselves are directly applicable, i.e. EEC Regulations and also (but with reservations) EEC directives and decisions.

Since the wording of art 55 appears to be clear, the supremacy of EC law in the French courts would seem to be secure. However, the situation in France was, until recently, less than satisfactory. This was due particularly to the existence of three supreme courts, viz. the Conseil constitutionnel,<sup>3</sup> the Cour de Cassation (the supreme civil and criminal court) and the Conseil d'Etat (the supreme

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<sup>3</sup> Note 2 *ibid.* See generally Favoreau & Philip, *Le Conseil Constitutionnel* 2nd ed. (1980); Brown & Garner, *French Administrative Law* 3rd ed. at 9-14 (1983).

administrative court). The remainder of this section will deal with the conflicts which have arisen between the courts in their acceptance of the supremacy of EC law.

(i) The Conseil constitutionnel

Under the 1958 Constitution, a special institution was created to enforce constitutional provisions such as art 55: the Conseil constitutionnel. The Conseil is expressly authorised by art 61 to determine the constitutionality of *lois*.<sup>4</sup> Such provision, however, has not led to the assumption by the Conseil constitutionnel of the responsibility for ensuring that Parliament respects France's treaty obligations.

In the *I.V.G.* case,<sup>5</sup> a group of French *députés* challenged the validity of the liberalised abortion law. They submitted that as the legislation permitted the destruction of human life, it violated *inter alia* the European Convention on Human Rights,<sup>6</sup> art 2 of which provides that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a [capital] sentence." The abortion law was therefore unconstitutional because it offended against the principle of the supremacy of the treaty over statute established by art 55.

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<sup>4</sup> This authority is subject to severe limitations, e.g. private persons may not invoke its jurisdiction for the redress of constitutional violations. The Constitution, art 61, originally gave *locus standi* only to the President, the Prime Minister and the presiding officers of the Senate and National Assembly. This was extended, by *L. constit.* 29 octobre 1974, to 60 members of one or the other legislative chamber.

<sup>5</sup> *Interruption volontaire de la grossesse*, Con. constit. 15 janvier 1975, Rec 19.

<sup>6</sup> Ratified by France, *décr.* 3 mai 1974, n° 74-360.



While the Conseil constitutionnel was prepared to accept that it was bound to ensure the conformity of legislation to the Constitution and that the Constitution gave treaties a higher authority than *lois*, it found<sup>7</sup> a third premise lacking viz. that "une loi contraire à un traité ne serait pas, pour autant, contraire à la Constitution."

It accordingly held that it lacked jurisdiction, under art 61, to review the conformity of a *loi* with a treaty. So far as the Conseil constitutionnel was concerned, a *loi* contrary to a treaty was not *per se* unconstitutional.<sup>8</sup> Since it had no jurisdiction to review the validity of a statute enacted subsequently to a treaty, this implied that all other courts were bound to undertake this task.<sup>9</sup> This message was immediately understood by the Cour de Cassation in its landmark judgment.

(ii) The Cour de Cassation

The seminal case in the ordinary courts regarding the supremacy of EC law and national law is *Administration des douanes c. Société des cafés Jacques Vabre*.<sup>10</sup> A coffee importer brought proceedings against the French customs authority to recover duties paid on the import of soluble coffee extract from the Netherlands as required by a *loi*

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<sup>7</sup> Note 5 at 20.

<sup>8</sup> See A.J.D.A. 1975.134, note Rivero; R.D.P. 1975.185, note Favoreau & Philip.

<sup>9</sup> See Errera, 'Recent Decisions of the French Conseil d'Etat' [1990] PL 134.

<sup>10</sup> Cass. 24 mai 1975: D.1975.497.

passed in 1966.<sup>11</sup> The plaintiff argued that, since those duties exceeded the taxes imposed on domestic producers of soluble coffee, it had been discriminated against contrary to EEC Art 95.<sup>12</sup>

The customs authority's defence was based on the ground that since the *loi* authorising the tax was posterior to the Treaty, the court was bound to enforce it, art 55 of the Constitution notwithstanding.

Nevertheless, both the lower court and the Paris Cour d'appel found for the plaintiff, ordering the customs authority to refund the duties and pay damages.

The customs authority appealed: it submitted, *inter alia*, that (i) the Cour d'appel had arrogated to itself the right to determine the constitutionality of a *loi* and this it could not do; and (ii) under art 55, a treaty was applicable in France only if the other country applied it: no attempt had been made to ascertain whether the Netherlands, the country from which the coffee extract had been imported, met this condition of reciprocity. Consequently art 55 could not be invoked as a basis for the application of the EEC Treaty in the case.

The Cour de Cassation rejected these arguments and upheld the decision of the Cour d'appel. In its decision it stated:<sup>13</sup>

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<sup>11</sup> L. 14 décembre 1966, n° 66-923, which gave statutory effect to the Code des douanes, art 265.

<sup>12</sup> This provides: "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."

<sup>13</sup> Note 10 at 506.

[L]e Traité du [CEE], qui, en vertu de l'article susvisé [art 55] de la Constitution, a une autorité supérieure à celle des lois, institue un ordre juridique propre intégré à celui des Etats membres; qu'en raison de cette spécificité, l'ordre juridique qu'il a créé est directement applicable aux ressortissants de ces Etats et s'impose à leurs juridictions; que, dès lors, c'est à bon droit, et sans excéder ses pouvoirs, que la cour d'appel a décidé que l'art. 95 du traité devait être appliqué en l'espèce, à l'exclusion de [la loi fiscale], bien que ce dernier texte fût postérieur....

This analysis implies that civil courts may refuse to enforce a *loi* for non-conformity with the EEC Treaty, without necessarily impugning its validity.

As regards the second submission, the Cour de Cassation rejected it on the ground that EEC Art 170 granted to each Member State the right to bring an action in the ECJ against any other Member State failing to apply the Treaty. Accordingly, as there was a legal procedure to remedy any lack of reciprocity, this could not constitute a ground for not implying the Treaty.<sup>14</sup>

(iii) The Conseil d'Etat

The Conseil d'Etat, however, decided otherwise: it was the first of France's highest courts compelled to deny recognition to a French statute in conflict with earlier EEC Treaty obligations.<sup>15</sup>

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<sup>14</sup> Shortly afterwards, the Cour de Cassation held in the case of *Von Kempis c. Geldof* (Cass. 15 décembre 1975: D.1976.33) that the EEC Treaty also prevailed over earlier French legislation without referring to art 55 of the Constitution.

<sup>15</sup> Bermann, 'French Treaties and French Courts: Two Problems of Supremacy' (1979) 28 ICLQ 458 at 459.

The case *Syndicat Général des Fabricants de semoules de France*<sup>16</sup> concerned EEC Reg 16/62 which took effect in July 1962 and called upon Member States to reduce to a common level the duties imposed upon the import of grain from third countries. By an *ordonnance* of September 1962 (which was later given retrospective statutory effect), it was provided that pre-July customs duties should apply to Algerian merchandise, notwithstanding that country's recent independence from France. The next year, the French Agriculture Minister applied pre-1962 customs duties to a major shipment of Algerian grain. The French National Association of Grain Producers thereupon commenced proceedings charging the Minister with a violation, *inter alia*, of the EEC regulation.

In her conclusions, Commissaire du gouvernement Questiaux expounded the traditional French constitutional theory in these terms:<sup>17</sup>

Certes, selon l'article 55 de la Constitution, tout traité régulièrement ratifié a, dès sa publication, une autorité supérieure à celle des lois. La Constitution affirme ainsi une prééminence du droit international sur la loi interne et de nombreuses voix (la quasi unanimité de la doctrine) s'élèvent pour que ne demeure pas lettre morte une disposition qui fait de notre Constitution une des plus accueillantes à un ordre juridique international.

Mais le juge administratif ne peut faire l'effort qui lui est demandé sans modifier, de sa seule volonté, sa place dans les institutions.

Il ne peut ni censurer ni méconnaître une loi.

After having recalled that the determination of the constitutionality of a *loi* belonged to the Conseil

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<sup>16</sup> CE 1<sup>er</sup> mars 1968, Rec 149. Conclusions of Commissaire du gouvernement Questiaux: A.J.D.A. 1968.235.

<sup>17</sup> A.J.D.A. 1968.238.

constitutionnel, the Commissaire du gouvernement maintained that the 1958 Constitution had failed to redefine the powers of the judges in this respect - a judge therefore did not have the power to establish a hierarchy amongst statutes.<sup>18</sup>

The Conseil d'Etat chose to follow the Commissaire du gouvernement thereby taking the position that it could not refuse to apply a French statute, even if it were incompatible with an earlier Treaty obligation. This position would seem curious for if art 55 of the Constitution suggests anything at all, it suggests that a court confronted with mutually inconsistent statutory and treaty provisions should apply the treaty, that norm carrying the greater authority. The outcome of the case was, however, the result of the Conseil d'Etat's traditional premise that, as an *administrative* court, it has no business questioning the legality of *legislative* action.<sup>19</sup>

This position was confirmed in another case *Union démocratique du travail*<sup>20</sup> concerning elections to the European Parliament. The Conseil d'Etat affirmed that whatever the Community norm (the case in point concerned a direct application of the EEC Treaty), the judge could only apply later national law, even if it were contrary to the Community norm.

The discrepancy between the respective positions of the Conseil d'Etat and the Cour de Cassation introduced a

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<sup>18</sup> Note 16 *ibid.*

<sup>19</sup> See *Arrighi*, CE 6 novembre 1936, Rec 966. The Conseil d'Etat does, however, examine the constitutionality of administrative action - *Syndicat régional des Quotidiens d'Algérie*, CE 4 avril 1952, Rec 210.

<sup>20</sup> CE 22 octobre 1979: A.J.D.A. 1980.39.

fundamental difference in the substantive law applied by those two courts. The Conseil's attitude amounted to a refusal to implement art 55 and, as regards EC law, it was inconsistent with ECJ jurisprudence.<sup>21</sup>

This position was radically altered by the recent decision of the Conseil d'Etat in the *Nicolo* case.<sup>22</sup> The applicant sought to annul the 1989 French election to the European Parliament on the ground that the 1977 French electoral law violated the Treaty of Rome. By virtue of EEC Art 227(1), the Treaty was applicable to "the French Republic." The electoral law provided for only one constituency viz. the European territory of France plus the overseas *départements* and territories. The applicant argued, however, that EEC Art 227(1) and (2) had to be construed as meaning that the instrument applied solely to the European territory of France and the election was therefore invalid.

The Conseil d'Etat held that the Constitution defined such overseas areas as an integral part of the French Republic and that, as the electoral rights of French overseas citizens were expressly extended to European elections by the 1977 law, they were lawfully permitted to vote in the 1989 election.<sup>23</sup> The Conseil therefore held that the 1977 law was not contrary to EEC Art 227(1). In so doing, it abandoned the previous

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<sup>21</sup> See Case 6/64 *Costa v. ENEL* [1964] ECR 585; Case 70/77 *Simmenthal SpA v. Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

<sup>22</sup> CE 20 octobre 1989, Rec 190; R.F.D.A. 1989.813, conclusions Frydman.

<sup>23</sup> Case 148/77 *Hansen (H) Jun. & OC Balle GmbH & Co v. Hauptzollamt Flensburg* [1978] ECR 1787.

jurisprudence, in effect accepting that it had jurisdiction to review the validity of a statute subsequent to a treaty.

In the absence of reasons for the Conseil's decision, the importance of the case lies in the carefully reasoned opinion of Commissaire du gouvernement Frydman. Having summed up previous jurisprudence and found it fully orthodox, he then proceeded to suggest a possible and more desirable construction of art 55 by which the courts were authorised to review the conformity of a statute with a treaty.<sup>24</sup> This construction, he suggested, was the only way to implement art 55 and thereby close the judicial gap which up until that time had characterised the state of the relationship between French law and Community law.<sup>25</sup> Moreover, he urged the Conseil d'Etat to extend such review to all international agreements.<sup>26</sup>

Consequently, the administrative courts are now bound to review, whenever the case arises, the conformity of statutes in relation to treaties, even if the plaintiff does not mention it.

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<sup>24</sup> R.F.D.A. 1989.813 at 816-818.

<sup>25</sup> Note 24 at 818.

<sup>26</sup> Note 24 at 822-823.

(b) Remedies in French Law

Before consideration of the remedies available against the French administration within a Community context, reference will be made to the respective jurisdictions of the civil and administrative courts within the French legal system.

Generally speaking, it is true to say that cases concerning the exercise of *puissance publique* will tend to fall within the competence of the Conseil d'Etat and the other administrative courts. This category includes, therefore, actions for interim relief and damages against the administration and judicial review or annulment of administrative acts.<sup>27</sup>

In a wide variety of circumstances, however, the legislature has intervened to create exceptions to the general principle that questions arising out of the exercise of public authority are justiciable in the administrative courts. Among the most important exceptions is indirect taxation, which expression includes, *inter alia*, customs and excise duties.<sup>28</sup> In cases involving reimbursement of duties levied in breach of EC law, then, the civil courts will usually have jurisdiction to rule on the question of restitution.

It is the purpose of the remaining sections of this chapter to examine various remedies through which the French courts have sought to safeguard Community rights of nationals against violation by the administration. The discussion will deal, first, with the restitution of taxes illegally levied;

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<sup>27</sup> See generally, Brown & Garner, *op. cit.* chap. 6.

<sup>28</sup> See Berr & Tremeau, *Le Droit Douanier* at 332 (1975).



secondly, the use of interim relief; thirdly, the availability of damages against the administration; and, finally, judicial review or annulment of national measures contrary to EC law.

(2) RESTITUTION

(a) General principles

The Code civil, arts 1235 and 1376 et seq., accords a right to restitution to the person who has paid over to another a sum which was not owed to him. As CC art 1235 states:

Tout paiement suppose une dette: ce qui a été payé sans être dû, est sujet à répétition.

La répétition n'est pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées.

Under the Code civil, two instances of restitution were explicitly recognised, viz. *gestion d'affaires*<sup>29</sup> and *paiement de l'indu*<sup>30</sup> but jurisprudence has sought to add a third, *l'enrichissement sans cause*.<sup>31</sup> It is the second instance of unjust enrichment, *paiement de l'indu*, with which this section is concerned.

(b) Répétition de l'indu

The right to an *action en répétition de l'indu* is contained in CC arts 1376 and 1377:

Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu.

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<sup>29</sup> CC arts 1372-1375. There is a *gestion d'affaires* whenever a person, *le gérant de l'affaire*, performs an act on behalf of and in the interest of another, *le maître de l'affaire*, without that other's authority.

<sup>30</sup> CC arts 1376-1381. That is to say, restitution of payments not due.

<sup>31</sup> i.e. Enrichment without cause. However it has been argued that the latter is in effect a principle of general application which includes both *gestion d'affaires* and *répétition de l'indu*: see Aubry & Rau, *Droit civil français* 6th ed., Vol 9 at para. 578 (1953). In 1892 this thesis was approved by the Chambre des Requêtes in *Patureau-Miran c Boudier*, Cass. 15 juin 1892: D.1892.1.596.

Lorsqu'une personne qui, par erreur, se croyait débitrice, a acquitté une dette, elle a le droit de répétition contre le créancier.

Néanmoins ce droit cesse dans le cas où le créancier a supprimé son titre par suite du paiement, sauf le recours de celui qui a payé contre le véritable débiteur.

The making of a payment not due gives rise to an obligation: the person who receives the payment, the *accipiens*, is debtor of that amount to the person who has paid it, the *solvens*. The action may only be brought, however, if three conditions are fulfilled, *viz.*:

(i) Inexistence of the debt - the debt must be legally inexistent. This means not only that the debt was unenforceable<sup>32</sup> but also that no obligation, whether natural or civil, binds the parties.<sup>33</sup>

(ii) Error of the *solvens* - the *solvens* must have paid in error.<sup>34</sup> Such error may be one of law or of fact but it must be excusable.<sup>35</sup> Where a person pays knowing that he is under no legal obligation to do so, he effectively makes a gift and cannot, under normal circumstances, claim repayment unless he

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<sup>32</sup> A natural obligation is unenforceable but if it is fulfilled by a debtor who is aware of its unenforceability then no action of repetition is admissible: see CC arts 1235, para. 2; 1965; and 1967.

<sup>33</sup> e.g. When a debt is paid to a person who is not the creditor or by a person who is not the debtor.

<sup>34</sup> This is stated expressly only in CC art 1377 but is now usually considered to be a rule of general application: see Mazeaud, Mazeaud & Chabas, *Leçons de Droit Civil*, Vol II, at 784-785 (1985).

<sup>35</sup> Planiol & Ripert, *Traité pratique de droit civil* 2nd ed., Vol 7, n°. 740 (1954); see e.g. *Société Hassanly c. Liegeois*, Cass. 7 décembre 1961: *Gaz. Pal.* 1962.1.287.

made the payment under constraint or subject to an explicit reservation.<sup>36</sup>

(iii) No destruction of title to debt - a restitutionary claim may be barred if the *accipiens*, having received payment from the wrong debtor, in good faith destroys his title to the debt.<sup>37</sup>

It should be noted, further, that in the case where the debt, which was the cause of the payment, has afterwards been annulled, doctrine and jurisprudence consider that the *répétition de l'indu* is only subject to two of the conditions generally demanded and not to the third, the error of the *solvens*.<sup>38</sup>

(c) Restitution in the field of customs law

Although many forms of taxation fall within the competence of the administrative courts, it is a principle of French law that indirect taxation, e.g. customs and excise duties, shall fall within the competence of the civil courts.<sup>39</sup>

The field of customs law is governed by the Codes des douanes and by numerous texts which are not codified.<sup>40</sup>

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<sup>36</sup> e.g. When he claims to have already paid the debt but to be unable to find the receipt.

<sup>37</sup> CC art 1377, para. 2.

<sup>38</sup> On this point see Mazeaud, Mazeaud & Chabas, *op. cit.* Vol II, at 785-786.

<sup>39</sup> Berr & Tremeau, *Le Droit Douanier* at 332 (1975).

<sup>40</sup> The present "Code" is based on the *décr. 8 décembre 1948*, n° 48-1985. The most important examples of non-codified texts are EEC Regulations which, by virtue of EEC Art 189, are directly applicable in Member States.

By virtue of CD art 357 *bis*, the civil courts are given jurisdiction over disputes concerning the payment or restitution of duties, *oppositions à contrainte* and other matters relating to duties not falling within the competence of the criminal jurisdiction under CD arts 356 and 357. A limitation period for restitutionary claims is imposed by CD art 352:<sup>41</sup>

Aucune personne n'est recevable à former, contre l'administration des douanes, des demandes en restitution de droits et de marchandises et paiements de loyers, trois ans après l'époque que les réclamateurs donnent aux paiements des droits, dépôts des marchandises et échéances des loyers.<sup>42</sup>

In exercise of their jurisdiction, civil courts are competent to give a ruling on individual disputes relating to the application of customs duties.<sup>43</sup> In particular, when seised of a claim for restitution of such duties, which is founded upon the alleged illegality of the tariffs, the civil courts must verify the legality of the regulations made by the Customs Administration which sought to authorise the levying of the duties.<sup>44</sup>

The competence of the civil courts alone to consider claims for restitution in such cases was underlined by the Conseil d'Etat where, having considered that a certain tax was equivalent to a customs duty under EEC Art 95, it concluded by

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<sup>41</sup> Under general civil law the limitation period for *actions en répétition de l'indu* runs for 30 years from the contested payment.

<sup>42</sup> By the L. 31 décembre 1968, n° 168-1247, the original *délai* was increased from two to three years.

<sup>43</sup> *Cordier c. Douanes*, Cass. 12 février 1968: J.C.P. 1969.II.15974, note L.S.C.

<sup>44</sup> *Société Sogegis*, TC 12 novembre 1984, Rec 451.

that that the administrative judge was not competent to have cognizance of submissions seeking restitution of the paid duties. However, the Conseil d'Etat went on to say that it alone could annul such conflicting national measures.<sup>45</sup>

Application of these principles will now be examined within the context of EC law.

(d) Restitution of sums levied in breach of EC law

Claims for restitution, commenced within the *délai* provided for by the Code des douanes, do not meet any particular difficulty. In *Administration des douanes c. Société des cafés Jacques Vabre*,<sup>46</sup> certain French companies imported soluble coffee extracts from the Netherlands and paid customs duties in accordance with CD art 265, which had been given statutory effect by the *loi du 14 décembre 1966*. They protested on the ground that manufacturers of soluble coffee in France paid taxes which were less than those they had to pay by way of import duties and reproached the customs administration for having levied, on their imports, duties contrary to EEC Art 95.<sup>47</sup>

The importing companies claimed both the reimbursement of the duties already paid and damages.

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<sup>45</sup> CE 1<sup>er</sup> mars 1985, *Docks vinicoles nantais*: A.J.D.A. 1985.380, note J.B.

<sup>46</sup> Trib. d'inst. du 1<sup>er</sup> arrondissement de Paris, 8 janvier 1971; CA Paris, 7 juillet 1973: D.1974.159; Cour de Cassation, 24 mai 1975: D.1975.497. For discussion of this case as regards the question of the primacy of EC law, see *supra* at 138.

<sup>47</sup> This provides by para. 1: "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."

The Tribunal d'instance admitted, for the period not yet covered by the prescription, the right of the importers to the restitution of --

l'intégralité de la taxe intérieure de consommation exigée par les services douaniers par fausse application d'une réglementation illégale.

On the other hand since, on the expiry of the *délai*, the act of taxation acquired *l'autorité d'une chose décidée*, i.e. that it could no longer be directly attacked, the Tribunal declared inadmissible the claim for restitution for the preceeding period:

Il est de principe constant qu'aucune réclamation ne peut être formulée à l'encontre des douanes, même pour répétition de droits versés par erreur ou illégalement, après accomplissement de la courte prescription prévue actuellement à l'article 352 du Code des douanes.

This judgment was confirmed by the Cour d'appel,<sup>48</sup> on the conclusions formed by Cabannes AG.<sup>49</sup> The court held that the tribunal d'instance was competent to appraise whether a law, viz. that of 14 décembre 1966, ceased to have effect as far as it was incompatible with EEC Art 95:<sup>50</sup>

Considérant au surplus que, même en admettant que la loi du 14 déc. 1966 ait donné une valeur législative à l'ensemble de l'art. 265 du Code des douanes, le tribunal d'instance n'en était pas moins compétent pour apprécier, non pas si cette loi est ou non constitutionnelle ... mais si elle cessait d'avoir effet dans la mesure où elle était incompatible avec l'art. 95 du Traité de Rome....

The Cour d'appel then proceeded to declare the *loi* inapplicable to the case. The companies would therefore be

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<sup>48</sup> CA Paris 7 juillet 1973: D.1974.159.

<sup>49</sup> Unreported.

<sup>50</sup> Note 48 at 161.

allowed to claim restitution and damages against the customs administration.

This decision was subsequently upheld by the Cour de Cassation.<sup>51</sup>

The next case for discussion is *SARL Les fils de Henri Ramel c. Administration des douanes et droits indirects*.<sup>52</sup> The French government, by a *décret*,<sup>53</sup> imposed a tax on table wines of Italian origin which the claimant, Société Ramel, imported into France. Following pressure from the European Commission, which had sought to instigate proceedings against France before the ECJ, the decree was abrogated. By that time, however, the importers of Italian wines into France had continued to pay the tax, the Société Ramel alone having paid over F2m. to the customs administration. Consequently, the company sought restitution of the sum on the grounds, *inter alia*, that the decree had been contrary to EEC Art 12.

The Cour d'appel de Lyon held that EEC Art 12, which prohibits all taxes of equivalent effect to a customs duty in intra-Community trade, had a direct effect in internal law and thus conferred on the company -<sup>54</sup>

... un droit à restitution des sommes par elle indûment payées en règlement d'une taxe établie en violation des dites dispositions; qu'ainsi l'action en restitution engagée par la société appelante sur le fondement du traité et dans les conditions prévues par l'art. 352 c. douanes, est bien fondée  
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<sup>51</sup> Cass. 24 mai 1975, D.1975.497. For a fuller discussion of this decision see *supra* at 138.

<sup>52</sup> CA Lyon 30 novembre 1978: D.1979.371, note Berr.

<sup>53</sup> *Décr.* 11 septembre 1975, n° 75-846.

<sup>54</sup> Note 52 at 373.



The court thereby affirmed, without any ambiguity, that the basis of the right to restitution was the direct effect of EEC Art 12 - it was therefore not the abrogation of the irregular decree which gave rise to the right of the claimant but the effect of the Community rules.<sup>55</sup> The court did recognize, though, that an action for restitution brought on the basis of the EEC Treaty had to be exercised "dans les conditions prévues par l'art. 352 c. douanes," e.g. such actions would have a limitation period of three years.

Moreover, the court continued, the *répétition de l'indu* was an institution common both to private law and to internal public law, and to the rules of which was subject the action for reimbursement of duties demanded by the customs authorities following an error in its part:<sup>56</sup>

... qu'en conséquence l'appauvrissement de redevable ne constitue pas et n'a jamais constitué une condition de ce remboursement; que par ailleurs l'erreur dudit redevable n'est pas non plus une condition de la restitution des droits, dès lors qu'il a été contraint de les payer pour retirer la marchandise indûment taxée....

Thus the *solvens*, the company, did not have to show any error on its part in paying the taxes in order to found a claim for restitution - the fact that it had had to pay the tax (later found to be contrary to the EEC Treaty) to redeem its goods was held to be sufficient.

Two further cases are worthy of brief mention. In the first, *Etat français-Administration des Douanes c. Société Rungis Porcs*,<sup>57</sup> the Cour d'appel de Douai held that the duties

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<sup>55</sup> See discussion of case by Berr, *loc. cit.* at 374.

<sup>56</sup> Note 52 at 373.

<sup>57</sup> CA Douai 6 juin 1984: D.1984.543.

levied were liable to be reimbursed since they were contrary to EC law. More importantly, it allowed the claimant to recover interest on the amount paid by applying CC art 1378<sup>58</sup> to the French State. In effect, the State was to be considered as a *débiteur de mauvaise foi* within the meaning of CC art 1378 and was condemned to pay interest on the sums which it had knowingly levied in violation of EC law.

The second, *Société Sogegis*,<sup>59</sup> concerned a company seeking restitution of a sum which represented the amount of tax paid on passengers carried between Italy and France. Such tax had been enacted by a *loi*<sup>60</sup> in accordance with the provisions of the Code des ports maritimes.<sup>61</sup> The company claimed that such rules were contrary to EC law since they introduced a discrimination between enterprises maintaining maritime traffic between the *départements* of Corsica and continental France and those enterprises maintaining that traffic between the same *départements* and Italy.

The Tribunal des Conflits, in an important ruling, underlined the fact that civil courts alone were competent to determine a claim for reimbursement of taxes levied in contravention of EC law.<sup>62</sup> In particular, it held that where the civil courts were seised of a claim for restitution of

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<sup>58</sup> This provides: "S'il y a eu mauvaise foi de la part de celui qui a reçu, il est tenu de restituer, tant le capital que les intérêts ou les fruits, du jour du payement."

<sup>59</sup> TC 12 novembre 1984, Rec 451.

<sup>60</sup> L. 28 décembre 1967, n° 67-1175.

<sup>61</sup> CPM arts L.211-1 and L.211-2.

<sup>62</sup> This was supported by the Conseil d'Etat in *Docks vinicoles nantais*, CE 1<sup>er</sup> mars 1985: A.J.D.A. 1985.380.

customs duties, which was founded upon the alleged illegality of the tariffs, they had to verify -<sup>63</sup>

... la légalité des dispositions réglementaires en vertu desquelles l'administration des douanes s'est prétendue autorisée à percevoir les droits et se prétend fondée à en refuser le remboursement ....

From these cases, it may accordingly be deduced that an individual's claim for restitution of taxes, levied by the French State in contravention of EC law, would not meet with any particular difficulty.

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<sup>63</sup> Note 59 at 452.

(3) CONDITIONS PRECEDENT TO BRINGING PROCEEDINGS IN THE  
ADMINISTRATIVE COURTS

Since the *conditions de recevabilité*<sup>64</sup> are generally applicable to an application for interim relief, to an action for damages against the administration and to an action for judicial review, these will be examined first followed by a discussion of the remedies available.

Before any *recours* can be brought, several conditions must be fulfilled, *viz.*:

(a) *L'acte administratif*

The complainant's proceedings must be directed at an *acte administratif* which is an administrative act or decision with judicial effect and not a hypothetical case.<sup>65</sup> The notion covers not merely *actes réglementaires*, i.e. measures of general application such as governmental decrees and ministerial decisions, but also *actes individuels* or *actes collectifs*, decisions which apply respectively to a single individual or to a group of individuals.<sup>66</sup> Since the act or

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<sup>64</sup> On this point, see generally Brown & Garner, *op. cit.* chap. 7. Crossland, 'Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany' (1975) 24 ICLQ 707 at 717-720.

<sup>65</sup> In *Gueyffier*, CE 10 juillet 1946, Rec 258, it was held that a letter from a prefect, stating the conditions under which an individual could be authorised to take water by means of a canal from a public fountain, was the giving of advice or a statement of policy and did not require the individual to do or desist from doing anything: it was not, therefore, an administrative act.

<sup>66</sup> An example of the latter is the decision of the examiners in an open competitive examination.

decision must be an *acte de nature à faire grief*,<sup>67</sup> a *recours* cannot be brought against *mesures d'ordre intérieur administratives*, e.g. the issue of circulars or the giving of instructions to subordinates.<sup>68</sup>

(b) La décision préalable

The rule of the "prior decision" is an established principle which indicates that any action brought before the administrative courts must be directed against a decision previously taken by the administration.

As regards proceedings to annul an administrative act, there is no difficulty: in such a case, annulment is being sought of a decision, either a decree or regulation, or an *arrêté* only affecting the individual litigant or as a rejection of a request.

In proceedings for damages, *en indemnité*, the rule is more important. A right to bring an action for damages against the administration does not accrue simply because some event<sup>69</sup> has happened; there must first be a decision<sup>70</sup> and it is only then, against such decision, that the litigant can seek redress in the administrative courts.

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<sup>67</sup> i.e., it must be capable of having a juridical effect on the complainant.

<sup>68</sup> See, e.g., *Carsault*, CE 10 décembre 1909: D.1911.3.103.

<sup>69</sup> e.g. A vehicle accident.

<sup>70</sup> e.g. A refusal by the administration to pay damages or damages which the victim deems to be inadequate.

(c) La qualité

The requirement of *locus standi* is given a fairly wide ambit in French law. The litigant must be affected; he must have some personal *intérêt à agir* in the act or decision. Various interests of the litigant have been held sufficient to justify an action by him, e.g.:

(i) Moral interest - in *Abbé Déliard*,<sup>71</sup> it was held that if a regulation or its bye-law affected religious freedom, then a priest or any member of that religion would have sufficient standing;

(ii) Financial interest - in *Cook et Fils*,<sup>72</sup> travel agents successfully challenged a municipal bye-law subjecting excursion charabancs to the same stringent regulations as taxi cabs;

(iii) Professional interest - in *Lot*,<sup>73</sup> a graduate whose degree was the required professional qualification for archivists, objected to the appointment of a non-graduate by the National Archives and it was held that he had *locus standi*.

(iv) Consumer or user interest - in *Syndicat des Propriétaires du Quartier-Croix-de-Seguey-Tivoli*,<sup>74</sup> users of a tramway line, linking their outlying section of Bordeaux to the centre, had sufficient interest to bring an action to review the legality of an administrative act affecting the continuation of that service.

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<sup>71</sup> CE 8 février 1908, Rec 127.

<sup>72</sup> CE 5 mai 1899, D.1900.3.218.

<sup>73</sup> CE 11 décembre 1903, Rec 780.

<sup>74</sup> CE 21 décembre 1906, Rec 962.

(v) Collective interest - in *Syndicat des Patrons Coiffeurs de Limoges*,<sup>75</sup> Sunday closing was ordered in Limoges and the hairdressers' trade was hit: it was held that they had standing to claim about their collective injury. Companies, societies and associations may therefore have *locus standi* to bring proceedings provided their interest as a group is aggrieved but not for an individual interest of one member.

(vi) Taxpayers - in *Casanova*,<sup>76</sup> a local taxpayer was held to be entitled to attack a decision of the prefect who had refused to annul a resolution of the municipal council to establish a clinic at public expense. But the Conseil d'Etat has refrained from granting the state taxpayer a right of action against national taxation as this would be tantamount to admitting an *action populaire*.<sup>77</sup>

(d) Le délai

Under French administrative law, there is a limitation period of two months within which an action must be commenced to challenge the act or decision. If it is a general act (*règlement*), the period runs from the date of publication but if it is an individual act, it runs from the date of notification to the individual involved. In the absence of an express decision, it runs from the implied decision to reject the claimant's demand, which is presumed in law after four months' silence by the administration.

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<sup>75</sup> CE 28 décembre 1906, Rec 977.

<sup>76</sup> CE 29 mars 1901, Rec 333.

<sup>77</sup> CE 13 février 1930, Rec 176.

The "silence rule", however, does not apply to a claim en *indemnité* against the administration: in that case, the claim has to be *expressly* rejected before the *délai* can begin to run.

(e) Le recours parallèle

Unlike the previous conditions, this one is applicable only to actions for annulment and requires that no other remedy is available which would give the complainant equal satisfaction and a like result.

In *Chabot*,<sup>78</sup> a litigant had the remedy of going to another tribunal having jurisdiction over electoral matters besides a *recours* for annulment. But the court could only set aside the election and order a new election to be held under the same conditions, whereas the *recours* could directly challenge the decision to redraw the *commune* boundary. It was held that the remedies were not *parallèle* and therefore the *recours* was admissible.

Although it is often difficult to find equivalent remedies, this condition seeks to prevent litigants using the *recours* as an easy way of avoiding other jurisdictions.

Having discussed the *conditions de recevabilité*, it is now necessary to examine first, the availability of interim relief; and then the two main categories of litigation coming before the administrative courts and which form the basis of

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<sup>78</sup> CE 7 août 1903, Rec 619.



the present study, viz.: (a) *le contentieux de pleine juridiction*; and (b) *le contentieux de l'annulation*.<sup>79</sup>

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<sup>79</sup> This follows from the fourfold distinction originally proposed by Laferrière, *Traité de la juridiction administrative et des recours contentieux* (1887). The other two categories are -

(3) *Le contentieux de l'interprétation*: explaining or interpreting an administrative act or decision in the sense of its legal meaning or signification; and

(4) *Le contentieux de la répression*: minor criminal jurisdiction for crimes relating to public property over which the public has a right of way.

See generally Brown & Garner, *op. cit.* at 110-112.

(4) INTERIM RELIEF

(a) Introduction

Although interim orders in French administrative law may take several forms,<sup>80</sup> the most important form of interim relief in French administrative law is *sursis*.

(b) Sursis

*Sursis* is an order which suspends the operation of an administrative decision *pendente lite* or of the judgment of a tribunal administratif pending appeal. In order to succeed, the applicant must show first that there is a risk of "irreparable damage" if the *sursis* were not to be granted<sup>81</sup> and, secondly, that he has a serious chance of success in his main application.<sup>82</sup> Even where these conditions<sup>83</sup> are fulfilled, the administrative court retains a residual discretion to refuse the order.<sup>84</sup>

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<sup>80</sup> The *reféré* is of limited scope and importance, dating from a law of 1889. The L. 28 novembre 1955, which allowed the President of the *section du contentieux* in cases of urgency to order "any appropriate measures" which would not prejudice the final decision, merely encouraged the use of expert assessments, *enquêtes* (delegated inquiries) and visits to sites within the scope of a *reféré*. Another form of interim relief, *astreinte*, was not available against the administration by the administrative courts until a law of 1982.

<sup>81</sup> *Soeurs hospitalières de l'Hotel-Dieu*, CE 23 novembre 1888, Rec 874.

<sup>82</sup> The requirement of *moyens sérieux*: *Chambre syndicale des constructeurs de moteurs d'avions*, CE 12 novembre 1938, Rec 840.

<sup>83</sup> These conditions are now incorporated in the governing regulations: *Ord. 31 juillet 1945*, no 45-1708 as amended by *décr. 30 juillet 1963*, n° 63-766 and *décr. 26 août 1975*, n° 75-791.

<sup>84</sup> *Association de sauvegarde de quartier Notre-Dame-à-Versailles*, CE 13 février 1976, Rec 100.

The Conseil d'Etat is empowered<sup>85</sup> to suspend execution in a *recours pour excès de pouvoir*<sup>86</sup> if an appeal seems likely to succeed or in a *recours en pleine juridiction*<sup>87</sup> if, in the case of reversal of the judgment on appeal, the administration risks loss of the sum awarded.<sup>88</sup>

Until comparatively recently, the Conseil d'Etat has regarded the grant of *sursis* as an *exceptional* measure.<sup>89</sup> In *Ministre d'Etat chargé des Affaires sociales c. Amoros*<sup>90</sup> the applicant medical students sought to be appointed intern on termination of their course. Owing to the student disorders of 1968, however, they had been prevented from sitting their final examinations. When the respondent authority refused to appoint, basing its decision on instructions contained in an apparently invalid ministerial circular, the applicants applied for *sursis*. The Conseil d'Etat refused to grant the order on the grounds that it would amount to the grant of an injunction against the administration which was not within the power of an administrative court. It stated that there could never, in principle, be *sursis* of a negative or executory

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<sup>85</sup> By *décr.* 30 juillet 1963, n° 63-766, art 54.

<sup>86</sup> See *infra* at 189.

<sup>87</sup> See *infra* at 167.

<sup>88</sup> The generous use of these provisions has led Loïc Philip ('Le *sursis* à l'exécution des décisions des juridictions administrative' D.1965.Chr.219 at 220) to conclude that *sursis*, conceived as a procedure designed to safeguard individual rights, tends to be utilised solely in favour of the administration.

<sup>89</sup> See Harlow, 'Remedies in French Administrative Law' [1977] PL 227 at 230-235 for a general discussion on this order.

<sup>90</sup> CE 23 janvier 1970, Rec 51.

administrative decision which had effected no change in the position of the parties.<sup>91</sup>

In a later case, *Konaté*,<sup>92</sup> the application for *sursis* was successful. The applicant (a Mali national) was arrested, illegally detained and deported without a hearing: the administration pleaded that the procedural rules as to hearing were not applicable to the case because of reasons of urgency. When the applicant sought *sursis*, the administration submitted that as he had been returned to Mali, there would be no point in making an order. The Conseil d'Etat held that *sursis* was appropriate and had not lost its point since the applicant might want to return to France and, if he did so, the administration would not be able to rely on an administrative decision which had been suspended. It is interesting to note that the Commissaire du gouvernement regarded it as self evident that deportation created irreversible damage for which damages would be inadequate compensation.

Despite *Amoros*<sup>93</sup> and the non-availability of injunctions against the administration, it has been argued that many administrative law judgments amount in practice to injunctions -*sursis*, even of executed acts,<sup>94</sup> are thinly disguised orders.<sup>95</sup>

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<sup>91</sup> The judgment was given against the advice of the Commissaire du gouvernement but was received favourably by, *inter alia*, Waline, 'Amoros (Note)' R.D.P. 1970.1035.

<sup>92</sup> CE 18 juin 1976, Rec 321.

<sup>93</sup> Note 90 *ibid.*

<sup>94</sup> Or, for that matter, awards of damages.

<sup>95</sup> *Konaté*, Note 92 *ibid.*, seems to be a thinly veiled command.

Waline has suggested<sup>96</sup> that the prohibition on the award of injunctions against the administration is confined to orders to do or to act.

Even if that is the case, the Conseil d'Etat still remains reluctant to grant *sursis*; it remains the exception: it is never the rule.<sup>97</sup> While the French administrative law system lacks a satisfactory equivalent to the English interlocutory injunction, interim relief would appear to be less than effective.

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<sup>96</sup> R.D.P. 1970.1035 at 1039 *et seq.*

<sup>97</sup> Harlow, *loc. cit.* at 230.

(5) DAMAGES: LE CONTENTIEUX DE PLEINE JURIDICTION

(a) Introduction

In the *recours en pleine juridiction*,<sup>98</sup> the administrative court has all the regular powers of an ordinary civil court to decide fact and law - hence the term, "full jurisdiction." Not only can it annul an administrative act but it can modify it or substitute another. More importantly, the court can also award pecuniary damages against the administration: damages are the chief remedy available to the litigant in this *recours* and the principles on which they are awarded largely mirror the pattern of the Code civil.

Until the end of the 19th century, except where provided for by statute, the prevailing principle was that no compensation could be obtained from public authorities for damage caused by their actions. In 1873, however, the Tribunal des Conflits<sup>99</sup> in its seminal *Blanco* decision<sup>100</sup> firmly established the autonomy and distinctiveness of the régime of public tort liability. The case concerned a child, Agnès Blanco, who was injured by a wagon which was crossing the road between different parts of the state-owned tobacco factory at Bordeaux. The question arose as to which court,

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<sup>98</sup> See generally: Auby, *Droit Public: 'Titre IV La Responsabilité Administrative'* (1985); Brown & Garner, *op. cit.* chap. 8; de Laubadère, Venezia & Gaudemet, *Traité de Droit Administratif* 10th ed., Vol I, *op. cit.*, Livre III 'La Responsabilité Administrative' (1988).

<sup>99</sup> The French dual system of courts, with its *droit administratif* and its *droit civil*, inevitably leads to conflicts of jurisdiction. However well disposed either set of courts may be to observe the rules which determine their respective competences, there are times when a final arbiter is needed. In France, this arbiter is the Tribunal des Conflits.

<sup>100</sup> TC 8 février 1873, Rec 1<sup>er</sup> suppl 61.

civil or administrative, the claim for damages could be brought. The Tribunal des Conflits held that since the injury arose out of the activities of a *service public*, the administrative court had jurisdiction. It confirmed that:<sup>101</sup>

... la responsabilité qui peut incomber à l'Etat pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public ne peut être régié par les principes qui sont établis dans le code civil pour les rapports de particulier à particulier; que cette responsabilité n'est ni générale, ni absolue; qu'elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'Etat avec les droits privés.

The court thereby established three principles. The first was that of the liability of the state for the fault of its servants; the second, that this administrative liability should be subject to rules which were separate and distinct from those of the *droit civil*; and the third, that such questions should fall within the jurisdiction of the administrative courts.<sup>102</sup>

Since then, the scope of public tort liability has been continuously extended and is now a general principle excluded only in a few exceptional cases. Indeed, the liability of public authorities both for fault (*faute*) and for risk (*risque*) is recognised, although the latter has a more

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<sup>101</sup> Note 100 *ibid.*

<sup>102</sup> In a later decision, *Feutry*, TC 29 février 1908, Rec 208, the general liability attributed to the State was held to apply to all public authorities, e.g. *départements* and *communes*. It should be noted, however, that traffic injury cases have since been removed from the administrative jurisdiction and now fall solely within the competence of the civil courts: L. 31 décembre 1957, n° 57-1424. See de Laubadère *etc. op. cit.* at 316-317.

restricted application and does not form part of the present discussion.<sup>103</sup>

(b) Fault liability

As has been seen, *Blanco* established the distinctive character of the law governing administrative torts with *faute*<sup>104</sup> as the basis of liability, i.e. one must compensate for the damage resulting from one's fault.

In the *Pelletier* case,<sup>105</sup> a newspaper publisher sued a prefect and a general who had seized his paper. The Tribunal des Conflits, in its decision, established the distinction between *faute de service* and *faute personnelle*. On the one hand, *faute personnelle* arose through some personal fault on the part of an identifiable official not connected with the public service: in such case, he could be sued personally in the civil courts. On the other hand, there was said to be *faute de service* when the poor functioning of the public service could not be linked to the personal action of one or more specified officials: in the case in point, the public service was deemed to have failed and therefore the administration had to be sued in the administrative courts.

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<sup>103</sup> For a full discussion on *risque* theory etc. see generally Auby, *op. cit.* at 522 ff; Brown & Garner, *op. cit.* at 120 ff; de Laubadère etc., *op. cit.* at 780 ff.

<sup>104</sup> See generally, Auby, *op. cit.* at 514 ff; Brown & Garner, *op. cit.* at 115 ff; de Laubadère etc., *op. cit.* at 773 ff.

<sup>105</sup> TC 30 juillet 1873, Rec 1<sup>er</sup> supplt 117.



The category of *faute de service* includes cases where the public service has unsatisfactorily<sup>106</sup> or belatedly<sup>107</sup> operated or did not function at all.<sup>108</sup>

If both *fautes* exist, *i.e. cumul des responsabilités*, the claimant can sue on either and appropriate contributions to damages will be ordered.<sup>109</sup> This notion of *cumul* was recognised in the *Anguet* case<sup>110</sup> and was further developed in *Lemonnier*.<sup>111</sup> In the latter case, a *commune* organised a shooting competition at targets floating on a river. During the competition, the complainant was walking along the opposite bank and was struck by a bullet; he claimed damages against the *conseil municipal*. Evidence indicated that other persons had earlier complained to the mayor of being narrowly missed by bullets. The complainant commenced proceedings in both the civil and administrative courts. When the case came before the Conseil d'Etat, the civil courts had already held the mayor liable in damages for his personal fault in allowing the competition to continue. The Conseil d'Etat nevertheless held itself competent to proceed with the matter and found that the mayor's negligence constituted a *cumul des*

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<sup>106</sup> See e.g. *Le Meut*, CE 20 avril 1934, Rec 463; *Ruel*, CE 5 décembre 1947: S.1948.3.6; *Larue*, CE 13 mai 1970, Rec 331.

<sup>107</sup> See e.g. *Malou*, CE 25 novembre 1921, Rec 975; *SCI de la vallée de Chevreuse*, CE 14 mars 1975, Rec 197.

<sup>108</sup> *Syndicat de défense des grands vins de la Côte-d'Or*, CE 24 juillet 1936: D.1937.3.41.

<sup>109</sup> See e.g. *Laruelle*, CE 28 juillet 1951, Rec 464.

<sup>110</sup> CE 3 février 1911, Rec 146.

<sup>111</sup> CE 26 juillet 1918, Rec 761.

responsabilités. As the Commissaire du gouvernement, Leon Blum, concluded:<sup>112</sup>

...[S]i elle [la faute personnelle] a été commise dans le service, ou à l'occasion du service, si les moyens et les instruments de la faute ont été mis à la disposition du coupable par le service, si la victime n'a été mise en présence du coupable que par l'effet du jeu du service, si, en un mot, le service a conditionné l'accomplissement de la faute ou la production de ses conséquences dommageables vis-à-vis d'un individu déterminé, le juge administratif, alors, pourra et devra dire: la faute se détache peut-être du service; c'est affaire aux tribunaux d'en décider; mais le service ne se détache pas de la faute.

The typical case of administrative liability arises from the unlawfulness of an administrative act. Such an act may be annulled by the administrative courts which in turn may give rise to the liability of the administration. But not every illegality will entail liability. For example, in *Leca*<sup>113</sup> and *Vally*,<sup>114</sup> it was considered that when an administrative act was annulled for breach of a purely procedural requirement and the same act, substantively, might be remade following the correct procedure, there was no real damage suffered - the Conseil d'Etat viewed the declaration of nullity as sufficient sanction.

Until comparatively recently, public authorities could not be held liable for damage sustained as a result of a simple error of judgment, an *erreur d'appréciation*.<sup>115</sup> In

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<sup>112</sup> Observations of Commissaire du gouvernement Blum, S.1918.41 at 45.

<sup>113</sup> CE 22 mai 1942, Rec 160.

<sup>114</sup> CE 20 novembre 1942, Rec 326.

<sup>115</sup> See e.g. *Vuldy*, CE 17 juin 1940, Rec 97; *Dechavanine*, CE 4 juin 1943, Rec 143.

*Ville de Paris c. Driancourt*,<sup>116</sup> however, the Conseil d'Etat acknowledged the liability of public authorities in such circumstances and it has been suggested,<sup>117</sup> on the basis of this case, that every illegal decision is *fautive*.

(c) Non-fault liability

The general principle underlying the non-fault liability<sup>118</sup> system is that of *égalité devant les charges publiques*, i.e. the equality of all citizens in bearing public burdens. Professor Duguit explained its rationale along the following lines:<sup>119</sup>

L'activité de l'Etat s'exerce dans l'intérêt de la collectivité tout entière; les charges qu'il entraîne ne doivent pas peser plus lourdement sur les uns que sur les autres. Si donc il résulte de l'intervention étatique un préjudice spécial pour quelques-uns, la collectivité doit le réparer, qu'il y ait une faute des agents publics, soit même qu'il n'y en ait pas. L'Etat est, en quelque sorte, assureur de ce qu'on appelle souvent le risque social....

Liability is here based on the principle that what is done in the general interest, even if done lawfully, may still give rise to a right to compensation should the burden fall on one particular person. For present purposes, one of the most interesting areas in which the Conseil d'Etat has imposed

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<sup>116</sup> CE 26 janvier 1973, Rec 78; see also *Chanois*, CE 22 mai 1974, Rec 298; and *Epoux Guinard*, CE 6 octobre 1976, Rec 392.

<sup>117</sup> Green & Barav, 'National Damages for Breach of EEC Law' (1986) 6 YEL 55 at 74.

<sup>118</sup> As was noted earlier (Note 103) the theory of *risque* does not form part of the present discussion.

<sup>119</sup> Duguit, *Traité de Droit Constitutionnel* 3rd ed., Vol 1, at 469 (1928).

liability without fault upon the administration, is where such liability arises out of legislation.

In *Société anonyme des produits laitiers "La Fleurette,"*<sup>120</sup> the complainant dairy company sought damages against the State in respect of losses which it incurred when it had to discontinue marketing its brand of artificial cream. The statute in question banned the manufacture and sale of any article under the name "cream" unless it consisted of real cream; in addition, the statute failed to provide for compensation. The Conseil d'Etat, invoking the principle of equality in bearing public burdens, decided that it was not the legislature's intention to impose an unequal sacrifice upon the complainant company and granted its claim:<sup>121</sup>

Considérant ... que rien, ni dans le texte même de la loi ou dans ses travaux préparatoires, ni dans l'ensemble des circonstances de l'affaire, ne permet de penser que le législateur a entendu faire supporter à l'intéressée une charge qui ne lui incombe pas normalement; que cette charge, créée dans un intérêt général, doit être supportée par la collectivité; qu'il suit de là que la Société "La Fleurette" est fondée à demander que l'Etat soit condamné à lui payer une indemnité en réparation du préjudice par elle subi....

More recently, in *Compagnie général d'énergie radio-électrique,*<sup>122</sup> the Conseil d'Etat admitted the possibility of obtaining compensation for damage sustained as a result of the application of an international treaty which, as we have seen,<sup>123</sup> under the French Constitution has statutory force. But it was not until *Ministre des Affaires étrangères c. Dame*

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<sup>120</sup> CE 14 janvier 1938, Rec 244.

<sup>121</sup> Note 120 at 245.

<sup>122</sup> CE 30 mars 1966, Rec 257.

<sup>123</sup> See *supra* at 135.

*Burgat*<sup>124</sup> that the Conseil d'Etat, for the first time, acknowledged the liability of the State for loss resulting from the application of an international treaty:<sup>125</sup>

Considérant que, d'une part, il résulte clairement de ses dispositions que l'accord de siège du 2 juillet 1954, n'a pas entendu exclure toute indemnisation des préjudices nés de cet accord; que la loi du 6 août 1955 qui a autorisé la ratification de cet accord n'a pas non plus exclu cette indemnisation ... le préjudice invoqué doit être regardé comme présentant un caractère spécial; qu'enfin, ce préjudice, qui est certain, revêt en l'espèce une gravité suffisante; qu'ainsi la responsabilité de l'Etat se trouve engagée sur le fondement du principe de l'égalité des citoyens devant les charges publiques....

In concluding this part, it should be noted that the damage, for which the litigant seeks compensation, must have a certain<sup>126</sup> and direct<sup>127</sup> relationship with the administrative action which caused it. Where non-fault liability is concerned, additional requirements must be satisfied, viz. that the damage is particularly serious and special in that it is limited to a particular person or small group of individuals.<sup>128</sup>

The principle of administrative liability will now be examined in case law affecting the application of EC law in France.

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<sup>124</sup> CE 29 octobre 1976, Rec 452.

<sup>125</sup> Note 124 at 453.

<sup>126</sup> *Morlot*, CE 7 avril 1943, Rec 89; *Canel*, CE 24 mars 1944, Rec 102.

<sup>127</sup> See *Marais*, CE 14 octobre 1966, Rec 548; *Société des établissements de Lessailly et Bichebois*, CE 7 mars 1969, Rec 148; *Ministre de l'Intérieur c. Dame Montreer*, CE 21 mars 1969, Rec 186; *Compagnie Sade*, CE 25 février 1972, Rec 168.

<sup>128</sup> de Laubadère etc., *op. cit.* Vol I, at 793.

(d) Damages for breach of EC law

It is the aim of this section to consider the possibility of obtaining damages for breach of EC law by the administration. Since the field is quite broad, it is intended to examine only a few cases, of which the most important is *Ministre du Commerce extérieur c. Société Alivar*.<sup>129</sup>

In that case, the Italian company Alivar had concluded with the French co-operative society, Santerco, contracts for the purchase of potatoes in France which were to be exported to Italy. Before their delivery, however, France experienced a severe shortage of potatoes. As a result, the French authorities sought to regulate potato exports by introducing a quota system and a procedure, under which the exportation of the foodstuff was subject to submission to the customs authorities of a declaration previously endorsed by the agency for guidance and stabilisation of agricultural markets, FORMA.<sup>130</sup> This latter procedure was instituted by a notice to exporters published in the *Journal Officiel*<sup>131</sup> and effectively amounted to a system of prior authorisation.

Following a decision of the ECJ,<sup>132</sup> which declared France to have failed to fulfil its obligations under EEC Art 34 by imposing "quantitative restrictions on exports [or]

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<sup>129</sup> CE 23 mars 1984, Rec 128. For observations of the Commissaire du gouvernement see Gaz. Pal. 1984.1.329 at 329-331.

<sup>130</sup> Fonds d'Organisation et de Régularisation des Marchés Agricoles.

<sup>131</sup> J.O.R.F. 25 octobre 1975.

<sup>132</sup> Case 68/76 *Commission v. France* [1977] ECR 515.

measures having equivalent effect,"<sup>133</sup> the French measures were abrogated.<sup>134</sup>

In the meantime, however, Santerco's application for an export licence had been refused and as it was then unable to fulfil its contractual obligations, Alivar was forced hurriedly to buy potatoes from suppliers in other countries but at a higher price and of an inferior quality.

Since it had suffered a loss of some F28m,<sup>135</sup> Alivar commenced proceedings against both Santerco and the French Ministry for External Affairs. On the one hand, an arbitral tribunal made a final award exempting Santerco from any liability for breach of contract on the ground that the measures in question had constituted a *force majeure* and as such the French company was not contractually liable for the inexecution of its obligation. On the other hand, the French Ministry simply chose to ignore the application.

After four months,<sup>136</sup> Alivar brought an action seeking annulment of the negative decision inferred from the silence of the Ministry and an order for damages.

The Tribunal administratif de Paris,<sup>137</sup> basing its decision on the judgment of the ECJ in *Commission v.*

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<sup>133</sup> EEC Art 34 was subsequently declared to be of direct effect in Case 83/78 *Pigs Marketing Board v. Redmond* [1978] ECR 2347.

<sup>134</sup> J.O.R.F. 19 mai 1977.

<sup>135</sup> This represented the difference between the price actually paid and the cost stipulated in the original contract to which were added certain amounts for other commercial damage.

<sup>136</sup> See *supra* at 160.

<sup>137</sup> TA Paris 23 avril 1980: unreported.

France,<sup>138</sup> held that as the loss sustained by Alivar was the result of the French measures - which were in contravention of the EEC Treaty - the French State was accordingly liable to compensate the Italian company for such damage. Although the court had not stated that the *faute* had been committed by the Minister, nevertheless it must have based its decision on the breach of EEC Art 34 which, in French domestic law, itself gives rise to liability on the part of the administration.<sup>139</sup> The Minister therefore appealed to the Conseil d'Etat.

In his Opinion, Commissaire du gouvernement Denoix de Saint Marc stated<sup>140</sup> that the illegality of the administration's action was indisputable. The only question which was left for the court to resolve was whether the unlawfulness had to be deduced directly from the ECJ judgment or whether the Conseil d'Etat had to determine this point.

Although accepting that the administration's failure to fulfil its Treaty obligations had to be deduced from the decision of the ECJ, Denoix de Saint Marc pointed out<sup>141</sup> that:

vous [*i.e.*, le Conseil d'Etat] avez une autonomie totale pour rechercher si ce manquement constitue une illégalité, si cette illégalité est fautive et si elle entraîne droit à réparation au profit de la victime.

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<sup>138</sup> Note 132 *ibid.*

<sup>139</sup> See *supra* at 169.

<sup>140</sup> Gaz. Pal. 1984.1.329 at 330.

<sup>141</sup> Note 140 *ibid.*



He accepted as unquestionable the binding force of the ECJ's judgment and, having referred to the direct effect of EEC Art 34, he continued:<sup>142</sup>

[V]ous ne pouvez ignorer en l'espèce, ou feindre d'ignorer, l'existence d'un arrêt en manquement de la Cour de justice, alors surtout qu'il a servi de fondement au jugement qui vous est déféré.

Finding support in EEC Art 171 and the jurisprudence of the ECJ, he stated that a judgment under EEC Art 169, such as happened in the present case, assumed the authority of *res judicata* with regard to the Member State in question. Further, he referred to the case of *Waterkeyn*<sup>143</sup> and concluded that the Conseil d'Etat, on the basis of the judgment of the ECJ, had to recognize that there was a *manquement* on the part of the French state in the fulfilment of the obligations imposed on it by EEC Art 34. However, in accordance with *Waterkeyn*, he also recognised<sup>144</sup> that -

il est ... de votre compétence exclusive de tirer, des éléments juridiques fixés par la Cour de justice pour déterminer la portée des dispositions du droit communautaire, les conséquences que vous estimerez devoir en tirer pour apprécier l'existence, la nature et l'étendue des droits de la société Alivar à l'égard de l'Etat français.

The Commissaire du gouvernement consequently<sup>145</sup> advised the Conseil d'Etat to hold the notice to exporters as illegal under domestic law for violation of the directly effective EEC Art 34 and that "cette illégalité est, en droit français,

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<sup>142</sup> Note 140 *ibid.*

<sup>143</sup> Joined Cases 314-316/81 and 83/82 [1982] ECR 4337.

<sup>144</sup> Note 140 at 331.

<sup>145</sup> Note 140 at 331.

constitutive d'une faute de nature à engager la responsabilité de l'Etat."

The Conseil d'Etat<sup>146</sup> dismissed the Minister's appeal and reaffirmed Alivar's right to compensation. Its judgment, however, was based neither on the reasoning of the Tribunal administratif de Paris nor on that of the Commissaire du gouvernement. The Conseil d'Etat stated:<sup>147</sup>

Considérant qu'il appartient à la juridiction administrative française de déterminer si l'avis aux exportateurs et le refus de visa de la déclaration d'exportation, incriminés par la Société Alivar, sont de nature à engager la responsabilité de l'Etat à l'égard de cette société; qu'il résulte de l'instruction que ces actes ont été pris pour des motifs d'intérêt général tirés de l'état de pénurie du marché de la pomme de terre en France à la fin de 1975 et au début de 1976 et qui s'opposaient à l'octroi du visa de la déclaration d'exportation sollicitée par la société Alivar; que, dès lors, l'Etat français ne saurait être tenu à réparation envers cette société que sur le fondement de la responsabilité sans faute au cas où il serait justifié d'un préjudice anormal et spécial imputable à l'intervention de l'administration française;

Considérant qu'un tel préjudice résultant directement des actes de ladite administration est établi en l'espèce.

In effect, the Conseil d'Etat was directly confronted with the question of determining what consequences an administrative judge was to draw from a decision of the ECJ declaring a failure by the French State in fulfilling its EC obligations.

The decision in *Alivar* provides some form of reply to this question which is not without ambiguity: on the one hand, it affirms the exclusive competence of the national judge to draw the necessary consequences on the compensatory

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<sup>146</sup> CE 23 mars 1984, Rec 128.

<sup>147</sup> Note 146 at 128.

level from the decisions taken by national authorities in violation of the EEC Treaty; while on the other, it recognises in the case in point the responsibility of the French State on the basis of a non-fault liability régime which would alone be sufficient to support the claim.

Taking the first point, the Conseil d'Etat considered that it was a matter for its sole competence to determine whether the behaviour of the French administration, declared to be contrary to the EEC Treaty by the ECJ in a judgment rendered on the basis of EEC Art 169, was of a nature to give rise to the responsibility of the French state in regard to the victim of the violation.

In addition, it determined that such a national administrative act constituting a breach of a directly effective provision of EC law could, nevertheless, be regarded as neither unlawful nor wrongful in domestic law: not only did the Conseil d'Etat carefully avoid accepting the illegality of the notice to exporters (declared by the ECJ to be contrary to EC law) but it even endeavoured to justify the behaviour of the Minister by declaring that the litigious acts were made for "des motifs d'intérêt général" deriving from the shortage of potatoes in France and which precluded the grant of the endorsement of the export declaration solicited by Alivar.

It has been noted<sup>148</sup> that it would seem difficult to admit that such reasons could cover the flagrant illegality of the behaviour of the administration, illegality which had been

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<sup>148</sup> Simon & Barav, 'La Responsabilité de l'Administration nationale en cas de violation du droit communautaire' R.M.C. 1987.165 at 168.

formally noted at first instance by the Tribunal administratif de Paris.<sup>149</sup> The refusal to take note explicitly of the illegality of the act led the Conseil d'Etat to avoid basing the right to compensation on the ground of the *faute* of the administration on account of the irregularity of its behaviour.<sup>150</sup>

As regards the second point mentioned,<sup>151</sup> the Conseil d'Etat confirmed the judgment condemning the French State not because of the existence of a violation of EEC Art 34 (as the Tribunal administratif de Paris had done) but by activating as a matter of course the non-fault liability of the State. Accordingly, the *Alivar* decision breaks new ground from two points of view:

(i) It admits the bringing into play of non-fault liability in relation to administrative decisions concerning the regulation of the economy.

(ii) It appears to consider that this régime is exclusive of all appreciation of the *caractère fautif ou non* of the administration's action.

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<sup>149</sup> This attitude can appear all the more curious since the inferior administrative courts, like the Conseil d'Etat itself, have admitted, on occasions, in proceedings *pour excès de pouvoir*, that analogous administrative measures were illegal from the moment that they violated EC law: see *infra* at 197.

<sup>150</sup> This is supported by Green & Barav, *loc. cit.* at 79, where they state: "... since the Conseil d'Etat held that damages from the State could only be obtained on the basis of non-fault liability, could it not be inferred that the action of the French authorities was considered to be lawful, since following *Ville de Paris c. Driancourt* ... every illegal act constitutes inexorably a fault, capable of giving rise to liability?"

<sup>151</sup> See *supra* at 172.

Interestingly, the decision recognises in a very explicit way that there is a place in matters of economic regulation for a régime of non-fault liability of the public authority. Generally such liability is excluded in cases of economic legislation<sup>152</sup> but the Conseil d'Etat seems to premise the law relating to public tort liability in the economic sphere upon the general régime of state liability which acknowledges both fault and non-fault liability.

Applied to EC law, this solution may be able to lift one of the obstacles that the administrative judge is likely to encounter when he is obliged to draw the consequences from a decision establishing a failure of the French State to fulfil its EC obligations. In effect, if the failure is the result of a text of statutory value, the responsibility of the State would arise without the Conseil d'Etat having to pronounce on the lawfulness of such an enactment which it constantly refuses to do.<sup>153</sup>

But, on another level, the *Alivar* judgment brings a profound change to the law of public tort liability: in the domain in which EC law intervenes, the régime of liability applicable to administrative measures taken in the "general public interest" is a régime of non-fault liability subordinated to the existence of "un préjudice anormal et spécial" which is exclusive of all other régimes of

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<sup>152</sup> See e.g. *Ville d'Elbeuf*, CE 15 juillet 1949, Rec 359; *Costa*, CE 13 février 1952, Rec 104; *Compagnie française des cuirs*, CE 31 mai 1961, Rec 358.

<sup>153</sup> The responsibility of the State would arise in accordance with the principles in *La Fleurette*, CE 14 janvier 1938, Rec 25: for brief discussion see *supra* at 173. But now see *Nicolo* CE, 20 octobre 1989, Rec 190.

compensation. It has been considered<sup>154</sup> that the Conseil d'Etat must have intended to exclude from the debate all appreciation of the *caractère fautif ou non* of the measure taken by the administration.

This solution would therefore seem to limit the right to compensation to cases where the *préjudice* is of an abnormal and special character directly attributable to the administrative act. Such a demand seems hardly compatible with the obligation demanded of the national judge to draw all the *desired* consequences from a decision establishing the failure of a Member State to comply with the EC Treaties by ensuring an effective protection of the right of claimants.<sup>155</sup>

However, it has been suggested<sup>156</sup> that the reference in *Alivar* to the "general public interest" is crucial. It seems to indicate that measures issued in violation of EC law and not justified by the "general public interest" may be held unlawful and therefore wrongful, thus capable of giving rise to liability for fault, the régime of which is more favourable to its victims.<sup>157</sup>

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<sup>154</sup> Genevois, 'Société Alivar (Note)' A.D.J.A. 1984.396 at 399.

<sup>155</sup> Simon & Barav, *loc. cit.* at 168.

<sup>156</sup> Green & Barav, *loc. cit.* at 80.

<sup>157</sup> This approach may be compounded by the fact that, in judicial review proceedings, the Conseil d'Etat had already annulled an administrative measure held to contravene EEC Arts 30 and 31 and a ministerial decree which infringed an EEC Directive: see *infra* at 197 and at 208.

In conclusion, as regards the decision of the Conseil d'Etat in *Alivar*, it would be as well to follow the advice of one commentator:<sup>158</sup>

Ne doit donc être retenu de la décision commentée que ce qu'elle a explicitement jugé: l'affirmation de la compétence du juge national pour tirer les conséquences en droit interne des arrêts de la Cour de Justice rendus sur le fondement de l'article 171 du traité de Rome et l'application, même en matière économique, du régime de la responsabilité sans faute.

The same refusal to accord any importance to a judgment of the ECJ declaring a Member State to have failed to fulfil its Treaty obligations, particularly where the EC provision in question is of direct effect, was further seen in the case of *Société Tresch-Alsacaves c. Ministre de l'Economie, des Finances et du Budget*.<sup>159</sup>

The applicant company imported wines from Italy which were subjected to systematic analyses by the French customs authorities. These checks effectively delayed release of the wines for several months and cost the company over F2m. It therefore brought an action claiming damages on the ground that the procedures had infringed Community wine regulations and EEC Art 30.

In the meantime, the ECJ declared by order<sup>160</sup> and later by judgment<sup>161</sup> that the French customs measures of systematic checks on imports constituted measures having equivalent effect to quantitative restrictions contrary to EEC Art 30,

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<sup>158</sup> Genevois, *loc. cit.*

<sup>159</sup> TA Strasbourg 5 juin 1984: [1986] 2 CMLR 625.

<sup>160</sup> Case 42/84R *Commission v. France* [1982] ECR 841.

<sup>161</sup> [1983] ECR 1013.

which was of direct effect. Following this judgment recording the breach of France's obligations under the EEC Treaty, the company amended its claim for compensation on the basis of the illegality of the measures taken and of the *faute* imputable to the customs authorities therefrom.

However, Commissaire du gouvernement Raymond<sup>162</sup> rejected the argument drawn from EEC Art 30 while considering that EC law did not forbid verification measures by national authorities and no misuse of procedure could be established. Moreover, he excluded the relevance of the ECJ judgment, denying it any authority as *res judicata*, since it differed from the latter proceedings in respect of both the parties and the subject-matter.

Nevertheless, he did accord a certain *portée* to the ECJ's proposed solution - because customs authorities had to act and release the imported wine within a reasonable time, which the ECJ had held not to exceed 21 days, their failure to do so amounted to the committal of a *faute* giving rise to the liability of the State.

The Tribunal administratif de Strasbourg, while adopting basically the same solution, omitted any reference to the judgment of the ECJ. It recognised that by virtue of EEC Regulations -<sup>163</sup>

l'Administration était en droit de procéder à l'analyse de vins litigieux sans que les contrôles effectués constituent - du seul fait de leur existence - une entrave au principe de la libre circulation des produits énoncé par les articles 30 et suivants du Traité de Rome.

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<sup>162</sup> His Opinion is unreported.

<sup>163</sup> Note 159 at 630.



In addition, the customs authorities had not breached EEC Art 36. On the other hand, the Tribunal administratif held that although the authorities were not bound by a formal time limit for carrying out the customs clearance operations in question:<sup>164</sup>

celles-ci doivent s'effectuer dans un délai dont il est raisonnable - compte tenu des conditions dans lesquelles s'exerce le contrôle dont s'agit - de fixer au maximum la durée à 21 jours; qu'en dépassant notablement ce délai, sans apporter de justifications précises d'un tel retard, l'Etat a commis une faute de nature à engager sa responsabilité.

Although neither the direct effect of EEC Art 30 nor the ECJ judgment against France were mentioned, the Tribunal administratif complied with that judgment in deciding that a period in excess of 21 days for the performance of the analysis was to be regarded as unreasonable.

In both *Alivar* and *Tresch-Alsacaves*, the French administrative courts completely ignored the direct effect of the respective EEC Treaty provisions (EEC Arts 34 and 30) and drew no support from the judgment of the ECJ declaring the measures of the French state in each case to be violations of the EEC Treaty. Indeed neither the Conseil d'Etat nor the Tribunal administratif de Strasbourg held that an administrative measure taken by the French State, which had been declared illegal by the ECJ in EEC Art 169 proceedings, meant *ipso facto* that the French State had acted wrongfully. A judgment to that effect would have permitted the award of damages to the claimants in both cases in accordance with the

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<sup>164</sup> Note 159 at 630.

general principles on the liability of public authorities for unlawful decisions.<sup>165</sup>

From the point of view of Community law, it has been stated<sup>166</sup> that the most striking aspect of the *Tresch-Alsacaves* and *Alivar* decisions remains the fact that the Tribunal administratif de Strasbourg found, the breach of the EEC Treaty notwithstanding, that the administrative authorities concerned had acted unlawfully in French law and had thus committed a fault which entitled the claimant company to compensation; the Conseil d'Etat held, in effect, that although it constituted an infringement of the Treaty, the administrative act at stake was lawful and that, in such circumstances, the liability of public authorities could only be found to exist on a non-fault basis.

These cases must, however, be seen in relation to another -*Steinhauser c. Ville de Biarritz*.<sup>167</sup> In that case, it was acknowledged that a person had a right to compensation where he had suffered loss due to the application of a national rule, which had been declared by the ECJ to be incompatible with a directly effective EC provision.

The case concerned a professional artist of German nationality, resident in Biarritz, who sought permission from the city mayor to take part in the tendering procedure for allocation of rented lock-ups in an area belonging to the municipality. When this was refused on the ground that the

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<sup>165</sup> See e.g. *Mme. Carliez*, CE 19 juin 1981, Rec 274; *Ministre de l'Environnement et du Cadre de vie c. SCI Italie-Vandrezanne*, CE 17 juin 1983, Rec 267.

<sup>166</sup> Green & Barav, *loc. cit.* at 82-83.

<sup>167</sup> TA Pau 12 novembre 1985, Rec 514.

conditions of tender only permitted French nationals to apply, Steinhauser brought a *recours en annulation* against the decision of the mayor and demanded compensation for violation of EEC Art 52.

On a request for a preliminary ruling from the Tribunal administratif de Pau, the ECJ declared<sup>168</sup> that EEC Art 52 precluded the requirement of French nationality for taking part in the tendering procedure.

Drawing the consequences from this judgment, the Tribunal administratif annulled the tendering procedure and the contracts entered into pursuant to it as being incompatible with EC law and considered that this illegality was constitutive of a *faute* which gave rise to the liability of the city. The court therefore ordered that Steinhauser be compensated both for the loss of additional income which he would have earned from the showing of his works "dans un lieu particulièrement favorable" and for the *préjudice moral* suffered by him because the mayor, in making his decision, had failed to take into account that Steinhauser's father was of French origin.

In the light of the judgment of the ECJ, the Tribunal administratif found that a breach of EEC Art 52, as interpreted by the ECJ, had been committed by public authorities and, on this ground, ordered the municipality to make good the loss suffered as a result of its unlawful action: a simple violation of the EEC Treaty therefore entitled the victim to compensation.

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<sup>168</sup> Case 197/84 *Steinhauser c. City of Biarritz* [1985] ECR 1819 at 1827.

(6) JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: LE CONTENTIEUX  
DE L'ANNULATION

(a) Introduction

Under this jurisdiction, the complainant seeks annulment of some administrative act or decision on the ground of illegality. It differs from the *contentieux de pleine juridiction* in that it simply annuls an act and does not ask for something to be done for the complainant, e.g. an award of damages, and it is directed against the act and not against a *personne administrative*, e.g. the state, *département* or *commune*.

The actual form of proceedings for annulment depends on whether or not the litigious act or decision emanates from a body which is classified as a jurisdiction, e.g. the supreme disciplinary organs for old-established profession. If the body is so classified, a *recours en cassation* will lie to the Conseil d'Etat; if it is not classified as such, which is more frequent, a *recours pour excès de pouvoir* will come before the appropriate administrative court which may or may not be the Conseil d'Etat.

The present discussion will deal, first, with the *recours pour excès de pouvoir* and, secondly, with the *recours en cassation*.

(b) Recours pour excès de pouvoir

A *recours pour excès de pouvoir* is dependent upon the existence of an *acte administratif* which has to be of a

unilateral nature.<sup>169</sup> The principal remedy in this *recours* is an order for annulment, the effect of which is to remove the acte from the legal hierarchy either totally or, where appropriate, partially.<sup>170</sup> The authority of *la chose jugée* (or *res judicata*) attaches to orders of annulment: as soon as the annulment has been pronounced of an act referred to the administrative court, the competent administrative authority must satisfy the applicant.<sup>171</sup>

(c) *Recours en cassation*

A *recours en cassation* is the form of proceedings used for the annulment of a decision emanating from a specialised administrative jurisdiction. No appeal may be taken to the Conseil d'Etat on the merits of a decision; the Conseil d'Etat may only quash for procedural error or illegality (which may even extend to a mistake of fact) and then refer the case back for a new adjudication.

In such proceedings, the Conseil d'Etat imposes stringent rules of procedure in the formation of the decision but exercises less control over the decision itself than would otherwise be the case, mainly because these specialised bodies deal in detail with a particular activity and so have a greater knowledge and expertise in that particular field. The specialised jurisdictions include, e.g.:

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<sup>169</sup> Contracts are therefore excluded - a litigant must pursue his action through a *recours de pleine juridiction*.

<sup>170</sup> Auby, *L'inexistence des actes administratifs* at 308 (1951).

<sup>171</sup> Mestre, *Le Conseil d'Etat, Protecteur des Privilèges de l'Administration* at 75 (1974).

(i) The supreme disciplinary organs of the medical profession; dental surgeons; veterinarians; chemists; accountants; surveyors; and architects.

(ii) *La Commission de contrôle des banques* - a statutory body set up in 1941 to supervise banking law and practice with power to impose disciplinary sanctions upon banks in breach.

In this *recours* the various grounds of review for the *recours pour excès de pouvoir* are also available except *détournement de pouvoir*.<sup>172</sup>

(d) Grounds for review

The *recours* must be brought on the basis of one of the following grounds or *cas d'ouvertures*:<sup>173</sup>

(i) *Inexistence*

Where an act is simply non-existent for want of some essential element, there is no need to annul it since the court has only to declare its non-existence. This *cas* is rarely invoked - in most cases it is sufficient (however serious the illegality may be) to annul the administrative decision on one of the four traditional grounds to be discussed below.

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<sup>172</sup> Presumably this is because the French cannot imagine persons charged with a judicial function offending in this respect.

<sup>173</sup> It should be realised, however, that the administrative courts may at any time recognise a new *cas d'ouverture*, based on the general idea of administrative morality - the idea that the State is an honest man and must behave properly towards *l'administré*.

In *Rosan Girard*<sup>174</sup> the ground of *inexistence* was considered. The mayor of a *commune* declared the result of a communal election on the basis of votes contained in three only of four ballot boxes. Thereupon the prefect declared the election void and initiated the procedure for a fresh election: under the electoral regulations, however, he should have referred the case to the local administrative court. Since the prefect failed to do this, his decision purporting to avoid the original election was itself declared void by the Conseil d'Etat and held to have no existence in law.

(ii) *Incompétence*

Where an official acts completely without authority, his decision will be declared void for *incompétence*.<sup>175</sup> Accordingly, if the administration takes a decision in a domain reserved for Parliament by the Constitution,<sup>176</sup> the decision will be annulled on this ground.

For example, in *Syndicat régional des Quotidiens d'Algérie*,<sup>177</sup> a French "caretaker" government, carrying on the administration until a new government took office, sought to extend to Algeria a requisitioning statute passed in Paris. The Conseil d'Etat declared this acte to be void for

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<sup>174</sup> CE 31 mai 1957, Rec 758.

<sup>175</sup> This ground is the closest to what is known in English law as substantive *ultra vires*.

<sup>176</sup> See Constitution of the Fifth Republic (1958), arts 34, 37 and 38. Also Brown & Garner, *op. cit.* at 6-9.

<sup>177</sup> CE 14 avril 1952, Rec 210.

*incompétence* since such a government could only concern itself with current business.<sup>178</sup>

(iii) *Vice de forme*

Where the procedure or formalities laid down by statute have not been followed exactly, the *acte administratif* can be annulled on this ground.<sup>179</sup> The ambit of *forme* is flexible and includes as a fault of procedure the fact that the *droits de défense*<sup>180</sup> have been disregarded.

The *Davin* case<sup>181</sup> involved the headmistress of a *lycée* who required the father of a pupil to remove her from school. The Conseil d'Etat held that she should first have stated the reasons for this requirement and then given the father the opportunity of replying to those reasons. Her decision was therefore quashed for *vice de forme*.

It should be noted, however, that the *vice* must be substantial and not merely accessory.<sup>182</sup> Since it has been stated that it is substantial if it can "influence le sens de la décision ou constituant une garantie pour les

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<sup>178</sup> Moreover, in such a case it was a matter for the administrative courts to decide what were "current business" and it was within their jurisdiction to find that such a matter as requisitioning did not fall within this category.

<sup>179</sup> This corresponds to procedural *ultra vires* in English law.

<sup>180</sup> Similar to the general principles of a fair hearing in English law.

<sup>181</sup> CE 26 janvier 1966, Rec 60.

<sup>182</sup> Thus in *Election municipale d'Aix*, CE 14 février 1930, Rec 186, election irregularities occurred in that persons not on the register voted but this *vice de forme* was not quashed because the extra votes could not affect the result.



administrés,"<sup>183</sup> the existence of a procedural defect is not of itself a ground for quashing the act or decision.

(iv) *Violation de la loi*

Where the *acte administratif* is declared to be in violation of statute, the Constitution, ministerial regulations, international treaties and other written law, it may be annulled on this ground. In such case, the Conseil d'Etat not only looks at the formal invalidity of the *acte* but goes on to examine its content in order to determine whether it conforms with the legal conditions set upon administrative action in the particular case. It includes *l'erreur de droit* (misinterpretation of the law) and *l'erreur de fait* (misinterpretation of fact).

Accordingly, the Conseil d'Etat examined the administration's assessment of the facts in *Gomel*.<sup>184</sup> In that case the Prefect of Paris, who was in charge of granting building licences and was empowered to refuse one if the height of the prospective structure would interfere with the *perspective monumentale*, refused Gomel a licence when he wanted to build on the corner of the *Place Beauvau* and the *Rue Miromesnil*. The Conseil d'Etat was willing to examine this particular *perspective* and decided there was nothing special about it and quashed the decision.

Since every administrative decision is based on certain facts as found by the administration, the Conseil d'Etat is

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<sup>183</sup> *Compagnie française des conduites d'eau*, CE 10 juillet 1964, Rec 396.

<sup>184</sup> CE 4 avril 1914, Rec 488.

entitled to examine these facts in order to ensure there is a proper legal basis for the decision. The violation may either be positive, e.g. where the administration commences disciplinary proceedings against an official which is not empowered to do so by the relevant statute, or negative, e.g. where the administration fails to act when obliged to do so.<sup>185</sup>

*Violation de la loi* will also be in issue where an administrative agency has a *competence liée*, a mandatory duty with no discretion: an applicant for a licence to open a chemist's shop is entitled as of right to a licence if the number of dispensaries in the locality is still below a certain statutory maximum - refusal of a licence is then a *violation de la loi* and would be quashed.<sup>186</sup>

(v) *Détournement de pouvoir*

Where an administrative power or discretion has been exercised "pour un objet autre que celui en vue duquel il lui a été conféré par la loi,"<sup>187</sup> it may be said that there has been a *détournement de pouvoir* or "abuse of power." In exercising this review, the court is bound not only by the precise terms of the statute but may also infer an object from

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<sup>185</sup> Although negative violations are rare, see *Syndicat de défense des grands vins de la Côte d'Or*, CE 24 juillet 1936, D.1936.3.41.

<sup>186</sup> This example is taken from Brown & Garner, *op. cit.* at 147.

<sup>187</sup> *Pariset*, CE 26 novembre 1875, Rec 934.

the reports of relevant legislative proceedings and from any relevant *travaux préparatoires*.<sup>188</sup>

It therefore involves an inquiry into the ends for which the power was given, as they appear from the statute's words and its spirit, as compared with the actual purpose for which it was used, and an inquiry into the subjective motives of the user of the power - matters which are sometimes quite difficult to establish.<sup>189</sup>

For instance, in *Dlle Rault*<sup>190</sup> regulations made by the mayor of a *commune* controlling the holding of dances were quashed when it appeared that they were made so as to encourage people to patronise his own inn. Similarly, in *Dlle Soulier*,<sup>191</sup> a school was started but it eventually appeared that it was in the sole interest of the man proposed as its director. The decision to open the school was therefore quashed.<sup>192</sup>

(e) Annulment of administrative acts for breach of EC law

There is an abundant case law on the use of the *recours en annulation* as a means of protecting the individual against a breach of EC law by French public authorities. Given the breadth of the subject, it is intended to examine only a few cases to highlight the sort of difficulties facing the

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<sup>188</sup> Where this fails, the Conseil d'Etat may be prepared to invent an intention: see *Tabouret et Laroche*, CE 5 juillet 1944, Rec 182.

<sup>189</sup> See generally de Laubadère etc., *op. cit.* at 429-431.

<sup>190</sup> CE 14 mars 1934, Rec 337.

<sup>191</sup> CE 5 mars 1954, Rec 139.

<sup>192</sup> For further examples, see Brown & Garner, *op. cit.* at 149.

litigant in the French courts particularly with regard to directives.

In *Syndicat national du commerce de la chaussure*<sup>193</sup> the Conseil d'Etat had to pronounce on the legality of memoranda to importers which allegedly breached EC provisions. Against a backdrop of increasing economic difficulties for the domestic shoe industry, the Minister of Foreign Trade, under the pretext of requiring statistical information, had issued two memoranda by which importers of leather shoes from non-EEC countries were obliged to obtain an import licence. This requirement was later extended to importers of shoes from EEC countries as well. Several trade associations challenged the validity of these memoranda.

After having recalled the terms of EEC Arts 30 and 31, the Conseil d'Etat ruled that such measures had an effect equivalent to quantitative restrictions on imports and therefore annulled the memoranda which had as their object and effect the delaying and limiting of the importation of the products involved:<sup>194</sup>

Considérant ... que si le ministre du commerce extérieur soutient que les décisions attaquées ont été prises à des fins d'information statistique, il ressort des pièces du dossier que ces décisions ont en réalité eu pour objet et pour effet de retarder et de limiter les importations des produits en cause; que dès lors les organismes requérants sont fondés à soutenir que le ministre du commerce extérieur a pris des mesures d'effet équivalent à des restrictions quantitatives et qui contreviennent aux dispositions claires des articles 30 et 31 précités du traité instituant la communauté économique européenne....

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<sup>193</sup> CE 18 décembre 1981, Rec 475.

<sup>194</sup> Note 193 at 476.

It may be said that this decision shows that, when a Community provision is undoubtedly directly effective and not likely to affect the French administrative courts' independence, the Conseil d'Etat will declare illegal national measures which contravene EC law.<sup>195</sup>

More interesting, however, are the problems which have arisen with respect to the effect of directives in the French administrative courts and the methods utilised to guarantee their efficacy.

The case of *Ministre de l'Intérieur c. Cohn-Bendit*<sup>196</sup> provides a starting point for this consideration. The litigant in that case was a German citizen, born in France where he was a permanent resident and a university student. At the time of the student revolt in May 1968, the French authorities regarded him as a ring-leader and they therefore deported him pursuant to an *arrêté* issued by the Interior Minister on the ground that he threatened *l'ordre public* (i.e., public policy).

Later, in 1975, he requested the Minister to cancel the deportation order affecting him, thereby allowing him to re-enter France and to reside there for the purpose of taking up an offer of employment made to him by a French firm. This request was rejected by a decision of the Minister in which he

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<sup>195</sup> It will be recalled that in its decision in *Alivar* (*supra* at 175), the Conseil d'Etat adopted a different position, by refusing to pronounce expressly the illegality of a measure of equivalent effect to a restriction in the exchange of products between Member States, a measure inspired, it is true, by a "motif d'intérêt général," the relative lack in the internal market of the potato during the relevant period.

<sup>196</sup> CE 22 décembre 1978, Rec 524. Observations of Commissaire du gouvernement Genevois: D.1979.155.

indicated "that it is not at present possible to give a favourable answer to it." Cohn-Bendit accordingly sought the annulment of this decision.

Before the Tribunal administratif in Paris he submitted, *inter alia*, that (a) the ministerial act had been taken in violation of EEC Art 48; and (b) by failing to inform him of the grounds of public policy on which the decision concerning him was based, the Minister had disregarded art 6 of EEC Dir 64/221<sup>197</sup> thereby infringing an essential procedural requirement: the decision of the Minister was therefore void.

In reply, the Minister argued for the dismissal of the petition on the grounds that (a) the provisions of Community law could not be effectively invoked by a national of an EC Member State who had had a proper deportation order made against him; and (b) the deportation order was still in existence and justifiable on the ground that the petitioner's presence still threatened public policy.

The Tribunal administratif decided to stay the proceedings while submitting a reference to the ECJ for a preliminary ruling. By submitting its questions, the Tribunal administratif had thereby implicitly recognised the right of EC nationals to invoke EEC directives before a national court and therefore acknowledged their self-executing character.

The Interior Minister appealed against this decision to refer, seeking to quash it on the ground that the EEC directive did not apply to Cohn-Bendit: the directive aimed

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<sup>197</sup> EEC Dir 64/221, art 6 provides that the individual affected by a repressive measure (*i.e.* a deportation order) must be informed of the grounds upon which that decision is based, unless that would be contrary to the security of the State.

at co-ordinating the statutory, regulatory and administrative provisions which laid down a special régime for aliens and not the power which each deportee had to ask that the decision affecting him be reconsidered.

Before the Conseil d'Etat, Commissaire du gouvernement Genevois summed up the question of law to be considered, *viz.* whether the provisions of a directive enacted on the basis of EEC Art 189(3) were capable of being relied upon before the courts of a Member State when the national authorities had not taken all the measures necessary for their application or without the legality of such measures being disputed.

Genevois began his observations by setting out in full the text of EEC Art 189. He continued:<sup>198</sup>

Comme on le voit, le texte de l'art 189 donne à penser qu'il n'existe de législation communautaire ayant un effet direct dans les Etats membres que sous la forme de règlement. La directive a une portée différente. S'il incombe aux autorités communautaires d'énoncer par voie de directive le résultat à atteindre par chaque Etat membre, seule une mesure d'exécution prise par les instances nationales peut lui conférer un effet dans l'ordre interne.

He pointed out the problem caused by the jurisprudence of the ECJ which had allowed the direct effectiveness in Member States of certain directives and even where no internal measures had been taken to implement them. Throughout his

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<sup>198</sup> D.1979.155 at 157.

observations, he criticised the case law of the ECJ<sup>199</sup> on this point, concluding that -<sup>200</sup>

Tant que la directive n'a pas fait l'objet de mesures d'ordre interne d'application, il peut tout au plus sanctionner, dans le cadre d'un recours de plein contentieux, le refus d'appliquer une directive dans un délai raisonnable.

However he continued:<sup>201</sup>

Si une mesure d'application de la directive a été prise par les autorités d'un Etat, le juge national peut exercer son contrôle sur la légalité de cette mesure au regard de l'art 189 (al. 3) du Traité, en usant si c'est nécessaire de la procédure de renvoi pour interprétation instituée par l'art. 177.

Since Cohn-Bendit had failed to contest the illegality of the implementation *décret* with regard to the provision of EEC Dir 64/221, his plea based on the disregard of art 6 of that directive could not be considered.

In his summing up, the Commissaire du gouvernement posed the crucial question, *viz.* whether the Conseil d'Etat should simply quash the Tribunal administratif's judgment on these grounds and exclude absolutely the direct effectiveness of any provision contained in a directive, thereby openly contradicting the ECJ's ruling on this matter. He advised the Conseil d'Etat against taking up such a position:<sup>202</sup>

Ce serait manquer singulièrement de déférence à l'égard du juge communautaire qui, de par le Traité de Rome, a pour mission de veiller à une application

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<sup>199</sup> e.g. Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337 and Case 36/75 *Rutili v. Minister of the Interior* [1975] ECR 1219, in which the ECJ held that categories of acts in EEC Art 189 other than Regulations could have direct effect: in the former case, art 3(1) of EEC Dir 64/221 was declared to be of direct effect.

<sup>200</sup> Note 198 at 159.

<sup>201</sup> Note 198 at 159.

<sup>202</sup> Note 198 at 160.



uniforme du droit communautaire sur le territoire des pays membres de la Communauté, que d'interpréter le Traité dans un sens qui va directement à l'encontre d'une jurisprudence bien établie de la Cour de justice des Communautés européennes.

Genevois therefore suggested that the Conseil d'Etat should confirm the Tribunal administratif's decision but indicated that its preliminary reference should be preceded by the following question:<sup>203</sup>

Dans une matière où le Traité de Rome a prévu que les institutions communautaires ne pourraient agir que par voie de directive, est-il possible, nonobstant les termes des art. 189 et 191 du Traité, d'admettre qu'une directive puisse produire des effets directs dans un Etat membre?

In its judgment the Conseil d'Etat expressly referred to EEC Art 56 but not EEC Art 48<sup>204</sup> and then proceeded to affirm that none of the EEC Treaty provisions authorised any organ of the Community to issue, in matters of *ordre public*, Regulations directly applicable in the Member States; co-ordination of statute and subordinate legislation had to be carried out, according to EEC Art 56, by way of EEC Directives. By virtue of EEC Art 189, such directives bound the Member States "as to the result to be achieved" but the national authorities alone retained the power to decide on the form and methods of implementation of the directives and,

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<sup>203</sup> Note 198 at 161.

<sup>204</sup> EEC Art 56 provides: "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

EEC Art 48 establishes the free movement of workers. Under para 3 such freedom "shall entail the right, subject to limitations on grounds of public policy, public security or public health: (a) to accept offers of employment actually made...."

under the control of the national courts, to determine the means appropriate to cause them to produce effect in national law. It followed that -<sup>205</sup>

Considérant ... qu'ainsi, quelles que soient d'ailleurs les précisions qu'elles contiennent à l'intention des Etats membres, les directives ne sauraient être invoquées par les ressortissants de ces Etats à l'appui d'un recours dirigé contre un acte administratif individuel; qu'il suit de là que le sieur Cohn-Bendit ne pouvait utilement soutenir, pour demander au tribunal administratif de Paris d'annuler la décision du ministre de l'Intérieur en date du 2 févr. 1976, que cette décision méconnaîtrait les dispositions de la directive arrêtée le 25 févr. 1964 ... que, dès lors, à défaut de toute contestation sur la légalité des mesures réglementaires prises par le gouvernement français pour se conformer aux directives arrêtées par le Conseil des communautés européennes, la solution que doit recevoir la requête du sieur Cohn-Bendit ne peut en aucun cas être subordonnée à l'interprétation de la directive du 25 févr. 1964....

Accordingly, the Conseil pronounced that the Tribunal administratif having erred in submitting questions on a preliminary ruling to the ECJ, its judgment was annulled.

It is apparent from this case that it expressly reserves for nationals of Member States the possibility to contest before their national judge the legality of the measures taken to implement a directive in relation to the provisions of that directive. This reservation appears on three occasions, viz.

... les autorités nationales ... restent seules compétentes pour décider de la forme à donner à l'exécution des directives et pour fixer elles-mêmes, *sous le contrôle des juridictions nationales*, les moyens propres à leur faire produire en droit interne....

... les directives ne sauraient être invoquées par les ressortissants de ces Etats à l'appui d'un recours dirigé contre un acte administratif individuel ....

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<sup>205</sup> CE décembre 1978, Rec 524 at 525.

... à défaut de toute contestation sur la légalité des mesures réglementaires prises par le gouvernement français pour se conformer aux directives ... la solution que doit recevoir la requête du sieur Cohn-Bendit ne peut en aucun cas être subordonnée à l'interprétation de la directive du 25 févr. 1964 ....

In other words, because Cohn-Bendit could not usefully take advantage of the provisions of EEC Dir 64/221 against the decision of the Interior Minister refusing to abrogate the expulsion order, he could have pleaded in support of his request the illegality of the *décret du 5 janvier 1970*<sup>206</sup> (which implemented EEC Dir 64/221), regulating the conditions of entry and residence of nationals of Member States in regard to this directive.

If such measures have been taken, their legality can be contested *vis-à-vis* the directive either by *voie d'action* or *voie d'exception*.<sup>207</sup> In so far as the national authorities are, as the decision underlines, *obliged* to adopt national measures towards a particular directive is directed, the Conseil d'Etat would be able to draw its inspiration from its own jurisprudence relating to the obligation of exercising the power to make regulations on the basis of provisions contained either in a *loi* or a *règlement*. When a text imposes an obligation on the administration to enact the necessary *règlements* for its application, the administration is not only obliged to conform to this obligation but must insert into such *règlements* all the provisions permitting the application

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<sup>206</sup> N° 70-29.

<sup>207</sup> *voie d'action*: by way of action, i.e. by bringing an action or suit; *voie d'exception*: by way of entering a plea.

of this text without ignoring *le sens et la portée* of the mission which has been devolved upon it.<sup>208</sup>

In this perspective, a *règlement* would be illegal which not only directly violated the directive which it purported to implement but also by ignoring *le sens et la portée* in not drawing all the consequences from it. The effect for the litigants would therefore be practically the same as it would have been if the Conseil d'Etat had recognised the possibility for litigants of directly invoking the directive against an *acte individuel*.<sup>209</sup> In other words, the possibility of pleading - in support of a *recours* against an *acte individuel* taken on the basis of the measures implementing a directive - the illegality of such measures in relation to the directive offers the litigant guarantees identical to the possibility of directly contesting the legality of an *acte individuel* in relation to the provisions of a directive.

On the other hand, these guarantees appear to be insufficient in the case where the government has not taken any measure to implement the directive. Although the decision itself is silent on this question, Commissaire du gouvernement Genevois considers that in this situation the administrative

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<sup>208</sup> *de Reynal et de Gentille* CE 19 mai 1961, Rec 337.

<sup>209</sup> It is suggested that, by admitting in the case in point that the refusal of abrogation of an expulsion order could be regarded as a *mésure speciale* in the sense of EEC Dir 64/221, Cohn-Bendit could have obtained the annulment of the Minister's decision since it was based on the *décr. 5 janvier 1970*, a text did not provide, contrary to the directive, for the communication of reasons for such an order. In other words, the possibility of pleading the illegality of measures taken to enact the directive in relation to the directive itself offers to the litigant identical guarantees to the possibility of directly contesting the legality of an *acte individuel vis-à-vis* the provisions of the directive.

judge would still be able to sanction, within the scope of a *recours en pleine juridiction*, the refusal to apply the directive by transposing its jurisprudence which considers as constitutive of a *faute* the non-intervention, within a reasonable *délai*, of the *règlements* or measures necessary for the implementation of laws.<sup>210</sup> It may also be considered that a decision refusing to take the necessary measures to implement a directive within a reasonable period could be referred to the administrative courts for *l'excès de pouvoir*, in the same way that the refusal to take the necessary measure to implement a *loi* or a *décret* under domestic law.<sup>211</sup>

Consequently, although the Conseil d'Etat declined to follow the lead of the ECJ in its jurisprudence favouring the direct effect of certain EEC Directives, it did not, however, deny all judicial effect to directives. By accepting expressly that the national authorities are obliged -<sup>212</sup>

d'adapter la législation et la réglementation des Etats membres aux directives qui leur sont destinées, ces autorités restent seules compétentes pour décider de la forme à donner à l'exécution des directives et pour fixer elles-mêmes, sous le contrôle des juridictions nationales, les moyens propres à leur faire produire effet en droit interne.

In other words, because Cohn-Bendit could not usefully take advantage of the provisions of EEC Dir 64/221 against the decision of the Interior Minister refusing to abrogate the

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<sup>210</sup> *Ministre des finances et des Affaires économiques c. Dame veuve Renard*, CE 27 novembre 1964, Rec 590; *Sociétés des ardoisières d'Angers*, CE 10 mars 1967, Rec 116.

<sup>211</sup> *Union de la production et du commerce des vins et eaux de vie d'Alsace*, CE 8 juillet 1966, Rec 455; *Richard*, CE 8 juin 1973, Rec 405.

<sup>212</sup> Note 205 at 525.

expulsion order, he could have pleaded in support of his request the illegality of the *décret du 5 janvier 1970* (which implemented EEC Dir 64/221), regulating the conditions of entry and residence of nationals of Member States in regard to this directive.

The *Cohn-Bendit* decision therefore reserved for individuals several legal routes for obtaining the application of an EEC Directive within the French administrative courts' system:

- (i) it expressly admitted that nationals could contest before their courts the *mesures réglementaires* issued to implement a directive, in regard to the provisions of this directive;
- (ii) it recognised for nationals their capacity to oppose, by use of all legal routes open to them in their country, the application of a rule of national law contrary to a directive;
- (iii) it permitted nationals, as the result of a change in either the factual or the legal context caused by the directive, to call on the government to abrogate *réglements* incompatible with the directive's objectives or to forbid the government from adopting new measures contrary to these objectives.<sup>213</sup>

During the last few years, all three routes of *recours* have been exercised successfully to give protection to rights deriving from EEC Directives.

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<sup>213</sup> In conformity with the principles established by the *Despujol* jurisprudence: see *infra* at 214.

(i) The control of the legality of *mesures réglementaires* issued in order to conform to the provisions of a directive

The case *Confédération nationale des sociétés de protection des animaux de France et des pays d'expression française*<sup>214</sup> concerned the legality of the *décret du 1<sup>er</sup> octobre 1980* enacted in application of art 276 of the Code rural which "interdit d'exercer des mauvais traitements envers les animaux domestiques ainsi qu'envers les animaux sauvages apprivoisés et tenus en captivité." In accordance with what this article recommended, the *décret* established a series of "mesures propres à assurer la protection de ces animaux contre les mauvais traitements ... et à leur éviter des souffrances lors des manipulations inhérentes aux diverses techniques ... de transport...."

The *décret* attacked had also been enacted to apply three texts from international law and EC law: the first one was the European Convention for the Protection of Animals during International Transport,<sup>215</sup> of which the first paragraph stipulates that each of the contracting parties will enact provisions relating to international transport of animals contained in the convention; the second text was EEC Dir 74/577,<sup>216</sup> relating to the stunning of animals before slaughter; and finally EEC Dir 77/489,<sup>217</sup> concerning the protection of animals in international transport and which literally reproduced the stipulations of the convention.

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<sup>214</sup> CE 28 septembre 1984: A.J.D.A. 1984.695.

<sup>215</sup> Which came into force in France on 1st July 1974.

<sup>216</sup> Dated 18 novembre 1974.

<sup>217</sup> Dated 18 juillet 1977.

The litigant confederation formulated two series of criticisms against the *décret*. The first consisted in maintaining that certain provisions contained in this text did not permit, by reason of their imprecision, the effective assumption of protection for transported animals and thus ignored the very precise terms of both the convention and the directive. The second called into question the legality of the *décret* in as much as it had not repeated certain of the prescriptions provided for by the international and EC texts.

In order to rule on the merits of the *pourvoi*, the Conseil d'Etat was thus led to define the rules to which the national authority must conform when it gives effect in domestic law to provisions of an EEC Directive or enacts the measures to implement an international convention.

The case enunciated, in a preamble of principle, the obligations and the rights of relevant national authorities on the exercise of their power to make *règlements* in similar cases. The government was obliged -<sup>218</sup>

édicter des dispositions soit identiques soit d'effet équivalent à celles de la convention et de la directive du 18 juillet 1977.

But, in the *décret*, the national authority could limit itself:<sup>219</sup>

à définir avec une précision suffisante les principes qu'il entendait retenir pour atteindre le résultat exigé et renvoyer à des arrêtés ministériels ultérieurs la fixation des modalités d'application de ces principes.

The case also recognised the power to supplement, on certain points, the text of the convention and the EC

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<sup>218</sup> Note 214 at 698.

<sup>219</sup> Note 214 at 698.



directives, *provided that* these additions did not run counter to the objectives which these texts pursued.<sup>220</sup> While judging that the national authority must, in order to satisfy the obligation incumbent on it - by virtue as much of art 1 of the convention as of EEC Art 189 - to enact provisions either identical or of equivalent effect to those of the directives and the convention, the Conseil d'Etat intended to indicate, as it had been invited to do by Commissaire du gouvernement Jeanneney,<sup>221</sup> that these texts not only - "... marquaient ... une orientation générale ou définissaient un état d'esprit dont le gouvernement aurait pu s'inspirer librement ..." - but also included precise prescriptions of which the latter had to take account. The national authority, according to Jeanneney, remained free to choose between an identical reproduction of the provisions of an EEC Directive or an international convention and an adaptation of those texts permitting the attainment of the same result that was sought by the EC authorities or by the authors of the convention. But it could not further distance itself from those texts without failing to fulfil its international commitments.

This obligation of general application was mitigated in its rigour, however, by the freedom recognised for the government to decide, in respect of domestic legal rules related to the hierarchy of judicial norms, the form which was best suited for giving to the adopted provisions and the means which were suitable to be employed in order to attain the required results.

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<sup>220</sup> Note 214 at 699.

<sup>221</sup> Note 214 at 696.

This freedom includes at least two aspects:

(a) The government remained free, first of all, to allocate among several texts enacted successively in time the means of application of an EEC Directive or an international convention. A *décret* enacted for the partial application of a directive or convention would only be illegal if the omissions, which it included, disclosed the intention of the national authority not to attain the results required by the texts, *i.e.* the intention of eluding the application of EEC Art 189 or a convention.<sup>222</sup> The only limit to the liberty to using various methods for the adaptation of directives was that the government had to proceed to enact those provisions, permitting the respect of the pursued objectives, either within the time limit anticipated by the directive or, in default, within a reasonable period.<sup>223</sup>

(b) The government could equally allocate between several texts of different juridical levels, measures for the adaptation of national law to the provisions of a directive or a convention. It could, and the *Confédération nationale* case expressly admitted it, proceed to a "selection" consisting of the enactment at the level of a *décret*, of the essential principles destined to assure the respect of the pursued objectives and, for the remainder, to refer to texts of an

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<sup>222</sup> In this sense and for a partial regulation for application of a *loi*, see: *Crèvecoeur*, CE 11 février 1955, Rec 86.

<sup>223</sup> In this sense on the consequences of the abstention of the administration from enacting such measures, see *Ministre des Finances et des Affaires économiques c. Dame veuve Renard*, CE 27 novembre 1964, Rec 590.

inferior juridical level the care of determining in detail the methods of applying these principles.<sup>224</sup>

In this exercise, two rules were imposed on the government. The latter had, on the one hand, to look to isolate (in often very detailed directives or conventions) those terms which expressed the objective or objectives to be attained without omitting any of them. On the other hand, it was obliged to respect the rules of domestic law governing the hierarchy of norms. If a *décret* could always, for the detail of its application, refer to a ministerial order, this latter should remain within the limits that that *décret* had fixed for it and enact only provisions which found their legal basis in the said *décret*.

(ii) The censure of measures taken in violation of an EEC Directive

It is also the ignorance of a directive relating to the protection of animals - EEC Dir 79/409<sup>225</sup> concerning the protection of wild animals - which was invoked in the case *Fédération française des sociétés de protection de la nature*.<sup>226</sup>

In that case, the measures attacked were the *arrêtés réglementaires du 20 avril 1982* by which the Environment Minister had modified the permanent regulatory order concerning the policy with regard to hunting (*police de la chasse*) in the Gironde *département* and had authorised the

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<sup>224</sup> Note 214 at 699.

<sup>225</sup> Dated 2 avril 1979.

<sup>226</sup> CE 7 décembre 1984, Rec 410.

hunting of the turtledove in the month of May in certain *communes* and *arrondissements* of that *département*. The applicant company maintained that these orders were contrary to the provisions of the EEC Dir 79/409, art 7, para. 4, in the terms of which Member States were obliged to protect migratory birds (which includes turtledoves) - "à ce que ces espèces ne soient pas chassées pendant leur période de reproduction et pendant leur trajet de retour vers leur lieu de vidification."

It was not doubted that the *arrêtés réglementaires* (which violated the provisions of the directive), took effect in domestic law. In underlining this point the Commissaire du gouvernement Dutheillet de Lamothe said -<sup>227</sup>

Or si les autorités nationales sont tenues, comme la rappelle la décision *Cohn-Bendit*, d'adapter la législation et la réglementation des Etats membres aux directives qui leur sont destinées, elles sont *a fortiori* tenues de ne pas adopter de dispositions réglementaires directement contraires aux objectifs d'une directive. Si vous contrôlez la légalité des mesures prises pour se conformer à une directive, vous devez évidemment contrôler également la légalité de mesures qui vont directement à l'encontre d'une directive.

In order to appreciate the validity of the means invoked in the case in point, the Conseil d'Etat was therefore driven to try to ascertain whether the order attacked fell within the scope of application of EEC Dir 79/409 and whether its provisions which the order enacted were contrary to the objectives defined by that directive.

The directive itself concerned, in terms of art 1, "la conservation de toutes les espèces d'oiseaux vivant naturellement à l'état sauvage sur le territoire des Etats

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<sup>227</sup> R.F.D.A. 1985.303 at 305.

membres," and had for its object the assurance of "une protection efficace des oiseaux migrateurs." Notably it laid down a ban on hunting migratory birds at certain times of the year. It was therefore clear that the attacked orders of the Environment Minister, if they had not been made to implement the directive, entered, by reason of their object, into the scope of the directive's application.

Were the orders contrary to the result sought by this text? The directive imposed, in art 7, in unambiguous terms, a precise object on Member States: to ban the hunting of migratory birds during their breeding season and during their return flight to their nesting place. Now, it was not contested that the opening period of the turtledove hunt authorised by the orders attacked - the month of May - coincided with the return flight of these birds to their nesting grounds and during their breeding season. The turtledoves, after having spent winter in Africa, return to Europe in spring in order to breed there.

The Conseil d'Etat was therefore inevitably driven to annul the provisions of the orders attacked as "pris en méconnaissance des objectifs définis par la directive du 2 avril 1975."<sup>228</sup>

(iii) Abrogation of national regulations due to changes in the factual or legal context provoked by a directive

The present discussion centres around two rules which were laid down by the Conseil d'Etat in *Despujol*,<sup>229</sup> a case

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<sup>228</sup> R.F.D.A. 1985.303 at 307.

<sup>229</sup> CE 10 janvier 1930, Rec 30.

concerning municipal regulation and taxation of the parking of motor cars. These rules may be stated as follows:

- on the one hand, where there is a change in the factual context which legally justified the *règlement*, interested parties can, at any moment, ask the author of the *règlement* to abrogate it or to modify it for the future and, if refused, to refer to the administrative courts for *l'excès de pouvoir* the rejection of this demand.<sup>230</sup>

- on the other, in the case of the new legal context created by a subsequent *loi*, interested parties can, within a time limit of two months from the publication of the *loi*, demand the annulment *pour excès de pouvoir* of the *règlement* itself.<sup>231</sup>

The application of the *Despujol* jurisprudence in the field of EC law recently arose in the case, *Compagnie Alitalia*.<sup>232</sup>

The background to the case may be thus summarised: under French law, the international carriage of passengers by air is exempt from VAT by virtue of art 262-II-8e of the Code général des impôts. The VAT imposed on the goods and services used in France by the airline companies for passenger carriage can be open to reimbursement by virtue of arts 271-4 of the Code and 242 of annex II, except when it concerns a case which, under the Code is excluded from the right to VAT deduction.

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<sup>230</sup> This rule was affirmed in *Ministre de l'Agriculture c. Simmonet*, CE 10 janvier 1964, Rec 16.

<sup>231</sup> For confirmation of this, see *Syndicat national des cadres de bibliothèques*, CE 10 janvier 1964, Rec 17.

<sup>232</sup> CE 3 février 1989, Rec 44. Observations of Commissaire du gouvernement Chahid-Nourai: R.F.D.A. 1989.391; note Dubois, *ibid.*, 417; note Beaud, *ibid.*, 411.

The administration considered that such was the case of certain foreign airline companies due to the services which they guaranteed to their passengers in transit. It invoked, in this respect, the provisions which carried with them the exclusion of the right to deduction and which were of a general or specific character, i.e. art 230 on the one hand, and arts 236 and 238 on the other, of annex II of the Code.

The airline companies concerned commenced a *recours en plein contentieux fiscal* in order to contest the refusal of reimbursement. But one company, Alitalia, added another procedure the effect of which it thought would be more radical. Basing itself on the provisions of art 3 of the *décret du 28 novembre 1983*<sup>233</sup> - which codified the *Despujol* jurisprudence - it asked the Prime Minister for the abrogation, due to non-conformity with the objectives of the Sixth EEC VAT Directive, EEC Dir 77/388, of all or part (according to the case) of the three above-cited articles of annex II which were derived from *règlements*.

The Prime Minister not having replied to this request, the Alitalia company contested before the Conseil d'Etat the implicit decision of rejection, resulting from the silence of the "competent authority."<sup>234</sup>

In its contentions, the applicant company relied on art 3 of the *décret du 28 novembre 1983* which provides -

l'autorité compétente est tenue de faire droit à une demande tendant à l'abrogation d'un règlement

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<sup>233</sup> N° 83-1025.

<sup>234</sup> Silence on the part of the administration in the face of the plaintiff's demand constitutes, after four months, an implied rejection, which is then justiciable as an *acte administratif*: see Brown & Garner, *op. cit.* at 99.

illégal, soit que le règlement ait été illégal dès la date de sa signature, soit que l'illégalité résulte des circonstances de droit ou de fait postérieurs à cette date.

In doing so, it was defending the argument based on the illegality of the refusal by the Prime Minister to abrogate the relevant provisions. The litigant company maintained first that the Prime Minister ought to have abrogated the *décret du 27 juillet 1967*<sup>235</sup> which became illegal following the subsequent publication of the Sixth VAT Directive, with which the *décret* was no longer compatible either partially or totally. On the other hand, it sought the annulment of two provisions of the *décret du 29 décembre 1979*,<sup>236</sup> this illustrated the opposite case of a *règlement* illegal *ab initio* in which it had been contrary, from its publication, to the objects of the VAT Directive.

The concrete problem which the Conseil d'Etat had to resolve in this case, therefore, was whether the administrative authority was obliged (*compétence liée*) to abrogate a French regulation which, either initially or subsequently, violated the objectives of an EEC Directive. It is here that the 1983 *décret*, codifying *Despujol*, intervenes to render the task of the judge more complex.

In fact, the state of previous jurisprudence left one to suppose that the administrative judge one day would admit the obligation to abrogate a regulation which became illegal by reason of a modification of the surrounding law provoked by

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<sup>235</sup> N° 67-604 which was codified under art 230 of annex II of the Code.

<sup>236</sup> N° 79-11663, arts 25 and 26 which were codified by arts 236 and 238 respectively of annex II to the Code.



the provisions of EC law. The obligation in itself is of the same principle as the *Despujol* decision and it had seen its field of application extended to the case of change of circumstances of law and of fact by two other, no less celebrated, decisions in 1964.<sup>237</sup> Although not defined by the judge, the question of knowing whether this *Despujol* jurisprudence could apply at the time of a change in the legal or factual environment provoked by EC law hardly left any doubts.

Since the conclusions of Commissaire du gouvernement Genevois in the *Cohn-Bendit* case,<sup>238</sup> it was understood in doctrine that the *recours* to this jurisprudential question was one of the "voies de droit pour obtenir l'application d'une directive."<sup>239</sup> In other words, the *Despujol* jurisprudence added to the number of judicial techniques likely to attenuate the lack of direct effect of directives in domestic law. Accordingly, on several occasions previous to *Alitalia*, the Conseil d'Etat had made use of one of these techniques in controlling the conformity of national measures to directives of which they constituted either a measure of compatible application or not or, failing that, a direct and inadmissible violation.<sup>240</sup> The case in point therefore offered the Conseil d'Etat the possibility of extending the range of

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<sup>237</sup> See Notes 230 and 231.

<sup>238</sup> D.1979.155.

<sup>239</sup> See Long, Weil & Braibant, *Les grands arrêts de la jurisprudence administrative* 8th ed. at 602 (1984).

<sup>240</sup> See the previous two sections of this article.

judicial means which litigants could have at their disposal in order to render a directive applicable.

The Prime Minister had contended that the request of Alitalia would lead the administrative judge to examine the conformity of a national law to the objectives contained in a directive. The Conseil d'Etat rejected this contention and stated that the task of the administrative judge -<sup>241</sup>

tend seulement à faire contrôler ... la compatibilité avec ces objectifs des décisions prises par le pouvoir réglementaire, sur le fondement d'une habilitation législative, pour faire produire à ladite directive ses effets en droit interne....

Applying these principle, the Conseil d'Etat found the various provisions of the Code to be incompatible with the objectives of the directive:<sup>242</sup>

Considérant ... qu'en revanche, la deuxième condition posée par l'article 230 paragraphe 1 de l'annexe II et tenant à l'affectation exclusive à l'exploitation des biens et services pouvant ouvrir droit à déduction n'est pas compatible avec l'objectif défini par la sixième directive dans la mesure où elle exclut de tout droit à déduction les biens et les services qui font l'objet d'une affectation seulement partielle à l'exploitation alors même que ces biens et services sont utilisés pour les besoins des opérations taxées; que, dans cette mesure, les dispositions de l'article 230 paragraphe 1 de l'annexe II sont devenues illégales et que la compagnie requérante était fondée à en demander l'abrogation ....

In conclusion, it stated<sup>243</sup> that -

Considérant qu'il résulte de tout ce qui précède que le Premier ministre a illégalement refusé dans les limites ci-dessus précisées de déférer à la demande de la compagnie Alitalia tendant à l'abrogation de l'article 1<sup>er</sup> du décret du 27 juillet 1967 et des articles 25 et 26 du décret du 29 décembre 1979....

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<sup>241</sup> Note 232 at 45.

<sup>242</sup> Note 232 at 46.

<sup>243</sup> Note 232 at 47.

Accordingly it annulled, on the grounds of illegality, those provisions contrary to the intended objectives of the Sixth VAT Directive.

The decision marked an important milestone in the development of the relationship between French administrative law and EC law. It had already been established<sup>244</sup> that once the time limit for transposition of a directive into internal law expired, French administrative jurisprudence would then assure the sanction of what could be called the positive violation of the directive, at least when this violation was imputable to the exercise of the national authority's power to make *règlements*.

The sanction of the negative violation, i.e. of the failure to enact in the time limit allowed the measures that include the execution of the directive, created more difficulties. In fact, the correct execution of the directive usually implied the modification of existing *lois* or *règlements* in order to adapt them to the result imposed by the directive. But, for 15 years, the European Commission had not stopped denouncing the failures of the State in the transposition of directives, failure for which France was as frequently guilty as, e.g., Italy, Greece and Belgium.

From the case of *Cohn-Bendit*, the Conseil d'Etat recognised that national authorities were "tenues d'adapter la législation et la réglementation des Etats membres aux directives" before "atteindre le résultat" that the directives defined. But until the *Alitalia* case, it had hardly

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<sup>244</sup> Through the *Cohn-Bendit*, *Fédération française des sociétés de protection de la nature* and *Confédération nationale des sociétés de protection des animaux de France* etc. cases.

accompanied this obligation with an effective sanction, thereby separating itself in that from the European Court of Justice.

The case of *Alitalia* fills a part of this gap and of the distance between the two different approaches, by making the EEC Directive benefit from the mechanism of abrogating national *règlements* that it sanctions. The Conseil d'Etat established a general principle of law<sup>245</sup> that -

Considérant que l'autorité compétente, saisie d'une demande tendant à l'abrogation d'un règlement illégal, est tenue d'y déférer, soit que ce règlement ait été illégal dès la date de sa signature, soit que l'illégalité résulte de circonstances de droit ou de fait postérieures à cette date.

As a result, after "l'expiration des délais impartis," this authority<sup>246</sup> could not "légalement laisser subsister des dispositions réglementaires qui ne seraient plus compatibles avec les objectifs définis par les directives," at least if it were seised of a request for abrogation presented by an interested party, the demand not being subject to any condition of *délai*.

The *Alitalia* jurisprudence appears likely to reinforce the sanction for failures of every type committed by the national authority, empowered to issue the necessary *règlements*, contrary to the directive. But it proves to be relatively weak in relation to positive violations, i.e. those which result from a *règlement*, enacted after the expiry of the defined time limit for the transposition, which infringes the directive. It may therefore come to the aid only of the

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<sup>245</sup> Note 232 at 44.

<sup>246</sup> Note 232 at 45.

litigant who would have failed to institute, within the necessary two months from publication, proceedings for annulment against this *règlement*.<sup>247</sup> Negligence, in all likelihood, is infrequent and the *exception d'illégalité* invoked against the *règlement*, in support of a *recours en annulation* instituted against an individual decision, ought more often to be sufficient to compensate for it.

Nevertheless, Alitalia had demanded the abrogation of provisions of the *décret du 29 décembre 1979*, subsequent to the date on which the directive ought to have been transposed, as well as the abrogation of the provisions of a much earlier one, the *décret du 27 juillet 1967*. And the litigant company obtained the annulment of the refusal which had opposed such abrogation.

The major interest of the *Alitalia* jurisprudence appears when the contested regulation is earlier than the directive. Every interested party can, once the time limit for transposition of the directive has expired, demand at any moment the abrogation of provisions of the *règlement* which are contrary to the objectives of the directive and, as in the *Alitalia* case, will obtain the annulment of the refusal which would be opposed to abrogation, if the litigant attacked it within two months. This type of *recours* does not entirely cover the failure of the national authorities: it does not substitute the directive's provisions for those of the domestic *règlement*. But it does produce a double effect: on the one hand, it forbids the national authorities from

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<sup>247</sup> *Fédération française des sociétés de protection de la nature*, CE 7 décembre 1984, Rec 40.

continuing to apply the existing *règlements* which contradict the directive. Thus, following the *Alitalia* decision, the Prime Minister was obliged to suppress an exclusion from VAT exemption applicable to certain services which the airline companies guaranteed to their passengers; on the other hand, the abrogation of one part of the existing regulation will often encourage the competent authority to enact the necessary norms for the execution of the directive, in order to give back a coherence to the national rule dislocated by a partial abrogation or in order to profit from the latitude offered to the Member States by the directive.

The three cases commented on constitute an important stage in the development of the *Cohn-Bendit* jurisprudence by the Conseil d'Etat in its application of Community law. Not only by controlling the conformity of measures enacted to adapt the national *règlement* to Community law and by censuring a *règlement* enacted in violation of the aims pursued by a directive but also by taking into account the changed legal and factual circumstances surrounding the enactment of national measures in the light of subsequent directives, the Conseil d'Etat has given full effect to the provisions of EEC Art 189. Accordingly, these decisions underline the fact that the divergences which exist between the Conseil d'Etat and the ECJ in regard to EEC Art 189 and the direct effect of directives remain limited.

## CHAPTER FOUR

### REMEDIES FOR BREACH OF EC LAW BY PUBLIC AUTHORITIES:

#### ITALY

##### (1) INTRODUCTION

##### (a) The relationship of Italian law and EC law

When Italy adhered to the EEC Treaty, it did so by means of an ordinary law, *legge 14 ottobre 1957*<sup>1</sup> and this has given rise to very sensitive constitutional issues relating to the application of EC law. This is because the Italian Constitution does not (i) clearly state that an ordinary law, unlike a constitutional amendment, can transfer national sovereignty to an international organisation; or (ii) clearly articulate the legal consequences of such a transfer of sovereignty.

The Corte costituzionale according to art 136(1) of the 1946 Constitution, has the power to review legislation and declare illegitimate Acts of Parliament (*leggi*) and subordinate legislation which do not conform to the Constitution. Accordingly, the court provides a uniform interpretation of all national laws *vis-à-vis* the Constitution within the Italian legal system.

When the court began the task of determining how to interrelate EC law and national law by attempting to place Community law within the constitutional framework governing the application of international law, two conceptual categories were provided by the Constitution. The court could

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<sup>1</sup> n. 1203.

consider EC law as if it were -

(i) customary international law under art 10,<sup>2</sup> in which case it would be applicable only through a centralised constitutional review procedure but not modified by subsequent ordinary laws; or

(ii) a treaty under art 11,<sup>3</sup> in which case it could be applied by any judge but also modified by subsequent Italian legislation.

The initial reaction of the Corte costituzionale was stated in *Costa v. ENEL*.<sup>4</sup> In that case, the court was called upon to decide whether or not the decree nationalising the electricity industry and establishing a monopoly in the shape of ENEL was contrary to various EEC Treaty provisions. It held that although Constitution art 11 permitted Italy to limit its sovereignty through adherence to the Community Treaties (without any constitutional amendment), it did not allow any exceptions to the principle of equal ranking of treaties and internal law, i.e. later law would take precedence over the treaty. The Corte costituzionale therefore declined to consider whether the law instituting ENEL conflicted with the EEC Treaty because the later national law automatically took priority over any Community law with which it conflicted. The ECJ in a contemporaneous related

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<sup>2</sup> "Italy's legal system conforms with the generally recognized principles of international law ..."

<sup>3</sup> "Italy ... agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations: it promotes and encourages international organisations having such ends in view."

<sup>4</sup> Corte Cost. 9 marzo 1964, n. 14: *Giur. cost.* 1964, 129.



case responded by declaring the supremacy of EC law even over subsequent laws.<sup>5</sup>

This initial position of the Corte costituzionale has not, however, been maintained. *Frontini c. Ministero delle Finanze*<sup>6</sup> marked an intermediate step in the court's developing ideas about the relationship of EC and national law. In that case, the court construed such a relationship as one between two separate, yet co-ordinated, legal orders and held that the EC Treaties had, on the basis of art 11, created a transfer of competence - administrative, jurisdictional and, most importantly, legislative - from the State to the Community institutions even though limited to specific matters provided for in the Treaties. Although Community law was held to prevail over conflicting national law and an ordinary judge was to apply directly applicable Community provisions, the Corte costituzionale did not resolve the conflict over national legislation enacted later than the EC provisions.

A further development in the court's reasoning occurred in *Società I.C.I.C. c. Ministero commercio con l'estero*.<sup>7</sup> The court concluded that later national legislation conflicting with Community law was unconstitutional on the grounds that this upset the division of competence accomplished by the Treaties and constitutionally guaranteed by art 11. However, at the procedural level, it affirmed that ordinary judges were under a duty to invoke the centralised review proceeding to

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<sup>5</sup> Case 6/64 *Costa v. ENEL* [1964] ECR 585.

<sup>6</sup> Corte Cost. 27 dicembre 1973, n. 183: *Giur. cost.* 1973, 2401.

<sup>7</sup> Corte Cost. 30 ottobre 1975, n. 232: *Giur. cost.* 1975, 2211.

obtain a declaration of the unconstitutionality of the subsequent ordinary law.<sup>8</sup>

Some six years later, the Corte costituzionale progressed further along the road to accepting the supremacy of EC law in *SpA Granital c. Amministrazione delle Finanze*.<sup>9</sup> The case involved a conflict between an Italian law, which provided that certain import duties were not retroactively applicable, and Community law, which provided that they were. The court concluded that EC law ought to apply in preference to both prior and subsequent conflicting laws without the need for resort to constitutional review.<sup>10</sup> Consequently, specific questions concerning the application of Community law were in principle no longer referable to the Corte costituzionale.

This decision accordingly took the "autonomy language" of the *Frontini* case<sup>11</sup> to its logical conclusion.<sup>12</sup> The adherence of the Italian State to the EC by means of art 11 of the Constitution made Community law applicable in Italy as the law of an autonomous legal order. Ordinary courts were therefore required to determine whether EC law covered the subject-matter dealt with by subsequent internal law. If it did, the Community norm was to take precedence over the

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<sup>8</sup> This requirement to challenge as inconsistent with art 11 a later statute conflicting with a rule of EC law, was unequivocally regarded by the ECJ in the *Simmenthal* case as inconsistent with Community law: Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629 at 645-646.

<sup>9</sup> Corte Cost. 5 giugno 1984, n. 170: *Giur. cost.* 1984, 1098.

<sup>10</sup> Note 9 at 1113-1117.

<sup>11</sup> Note 6 *ibid.*

<sup>12</sup> See La Pergola & Del Duca, 'Community Law, International Law and the Italian Constitution' (1985) 79 *AJIL* 598 at 613-616.

internal law without regard as to whether the internal law was adopted before or after the Community law. It was unnecessary, then, to seek a declaration of unconstitutionality or annulment of the internal law. Rather the court was to ignore it. Italy accordingly chose to grant superiority to EC law by withdrawing its own law.<sup>13</sup>

In a more recent case, *Provincia autonoma di Bolzano c. Presidente del Consiglio dei ministri*,<sup>14</sup> the Corte costituzionale asserted that national courts were to discard domestic legislation which conflicted with the principle of equality of treatment of self-employed workers, as defined by the ECJ on the basis of EEC Arts 52 and 59.<sup>15</sup> The Corte costituzionale stated:<sup>16</sup>

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<sup>13</sup> This did not mean, however, that the Corte costituzionale had surrendered its role as guarantor of the Constitution since, in the same judgment, it reserved to itself the power to rule on the conformity to Community norms any provisions of national law which were believed to be constitutionally unlawful because they were aimed at stopping or hindering continuing compliance with the scheme of the Treaty, or the essential core of its principles: Note 9 at 1114-1116. In *SpA Fragné c. Amministrazione delle Finanze dello Stato* (Corte Cost. 21 aprile 1989, n. 232: *Riv. dir. internaz* 1989, 103), the court affirmed that in principle a rule of Community law could not be applied in Italy if it infringed a fundamental human rights principle of the Constitution, notwithstanding the fact that the ECJ had accepted the legality of the rule. See Schermers, 'The Scales in Balance: National Constitutional Court v. Court of Justice' 27 CML Rev (1990), 94.

<sup>14</sup> Corte Cost. 11 luglio 1989, n. 389: *Riv. dir. internaz.* 1989, 404. See also Corte Cost. 23 aprile 1985, n. 113: *Giust. civ.* 1985, I, 1864.

<sup>15</sup> Case 63/86 *Commission v. Italy* [1988] ECR 29.

<sup>16</sup> Note 14 at 407: "...[T]he ECJ, as a qualified interpreter of Community law, authoritatively clarifies through its judgments the meaning of the rules pertaining to Community law and thereby defines in practice the scope and contents of application of these rules. When this principle is related to a rule having a 'direct effect' - that is a rule from which subjects operating within the legal systems of Member States draw rights which may directly be invoked before a court - the

[I]l Corte di giustizia, come interprete qualificato di questo diritto, ne precisa autoritariamente il significato con le proprie sentenze e, per tal via, ne determina, in definitiva, l'ampiezza e il contenuto delle possibilità applicative. Quando questo principio viene riferito a una norma comunitaria avente 'effetti diretti' - vale a dire a una norma dalla quale i soggetti operanti all'interno degli ordinamenti degli Stati membri possono trarre situazioni giuridiche direttamente tutelabili in giudizio - non v'è dubbio che la precisazione o l'integrazione del significato normativo compiute attraverso una sentenza dichiarativa della Corte di giustizia abbiano la stessa immediata efficacia delle disposizioni interpretate.

The underlying idea seems to be that, once it is established that a provision of EC law has a direct effect, national legislation conflicting with this provision should not be applied. As has been noted,<sup>17</sup> it is no longer important that, as the Corte costituzionale would have it in *Granital*, matters are entirely governed by EC law.<sup>18</sup> What is essential is that there is a rule of Community law that has a direct effect because rules of that type prevail over national legislation.<sup>19</sup> This is but one way of expressing the supremacy of EC law over national law.<sup>20</sup>

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clarification or integration of the legal meaning made by a declaratory judgment of the ECJ has the same effect as the provisions that have been construed."

<sup>17</sup> Gaja, 'New Developments in a Continuing Story: the Relationship between EEC law and Italian law' 27 CML Rev (1990), 83 at 85.

<sup>18</sup> But see *infra* at 292ff for problems related to the direct effect of directives.

<sup>19</sup> It accordingly abandoned (Note 14 at 408) the view held in *Granital* that, when Community rules were enacted, there was no longer any competence on the part of the national legislature.

<sup>20</sup> The Italian Parliament is now required to approve each year a statute (called a *legge comunitaria*) which is specifically designed to ensure that Italian law is consistent with EC law: L. 9 marzo 1989, n. 86 - the so-called "La Pergola Law." For a full discussion of this law see Gaja, *loc. cit.* at 89-93.

(b) Remedies in Italian law

Before considering the available remedies against the Italian administration within a Community context, reference must first be made to the essential dichotomy regarding the administrative and ordinary civil courts within the Italian legal system.

A remedy may be given by the administrative courts if the plaintiff's *interessi legittimi* (legitimate interests) are prejudiced by some act of the administration but if he is complaining of an infringement of a *diritto soggettivo* (private right) he must look to the ordinary civil courts for his remedy. The distinction between interests and rights is peculiar to the Italian system.

Zanobini has sought to define the *diritto* as "an interest, recognised by law as pertaining exclusively to the holder and as such protected in a direct and immediate manner",<sup>21</sup> whereas the *interesse legittimo* may be defined as "an individual interest closely connected with a public interest and protected by law only through the legal protection of the latter."<sup>22</sup>

In practice it means that actions for damages against the administration and the reimbursement of illegally-levied taxes must be brought in the ordinary courts whereas proceedings for the annulment of an administrative act by a party having sufficient standing must be brought in the administrative

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<sup>21</sup> Zanobini, *Corso di diritto amministrativo* 9th ed., Vol I, at 151 (1958).

<sup>22</sup> Note 21 at 152.

courts.<sup>23</sup> Consequently, where a plaintiff claims compensation for damage caused by an administration act, the litigant must first seek annulment of the act in the administrative courts and then bring another action before the ordinary courts for damages.

Following the pattern of previous chapters, each section in turn will deal with (a) the restitution of duties levied by the administration in violation of EC law; (b) the availability of interim relief; (c) the claiming of damages for breach of Community law by public authorities; and (d) the annulment of administrative acts issued in contravention of Community norms.

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<sup>23</sup> Any conflict between the two jurisdictions is resolved by the Corte di Cassazione, the highest civil court.

## (2) RESTITUTION

### (a) General principles

The person who has paid taxes, levied by public authorities contrary to EC law, is entitled to demand restitution of the sums paid. The general principle of restitution in Italian law was enshrined in the 1865 Codice civile, which closely followed the French Code civil.<sup>24</sup> The basis of the principle was art 1237:<sup>25</sup>

Ogni pagamento presuppone un debito: ciò che è pagato senza essere dovuto è ripetibile.

Under the 1942 Codice civile, three distinct bases for restitution were recognised, viz. *gestione di affari*;<sup>26</sup> *pagamento dell'indebito*;<sup>27</sup> and *arricchimento senza causa*.<sup>28</sup> For the purposes of the present study in the context of EC law, reference will be made only to the second ground.

### (b) Pagamento dell'indebito

*Pagamento dell'indebito* is considered as the source of the obligation to repay the amount received but which was not owed. The Codice civile retains a distinction between *indebito oggettivo*<sup>29</sup> in art 2033 and *indebito soggettivo*<sup>30</sup> in

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<sup>24</sup> See *supra* at 147.

<sup>25</sup> "Any payment supposes a debt: what has been paid without being due is subject to restitution."

<sup>26</sup> Management of affairs of another: arts 2028-2032.

<sup>27</sup> Payment of what is not due: arts 2033-2040.

<sup>28</sup> Unjust enrichment: arts 2041-2042.

<sup>29</sup> Objective payment, i.e. payment of a non-existing debt.

<sup>30</sup> Subjective payment, i.e. payment of another's debt.

art 2036.<sup>31</sup> Article 2033 provides:<sup>32</sup>

Chi ha eseguito un pagamento non dovuto ha diritto di ripetere ciò che ha pagato. Ha inoltre diritto ai frutti e agli interessi dal giorno del pagamento, se chi lo ha ricevuto era in mala fede, oppure se questi era in buona fede, dal giorno della domanda.

There are only two prerequisites to the founding of a claim for the *ripetizione dell'indebito* under art 2033, viz:

(i) There was a payment: In conformity with its preceding case law, the Corte di Cassazione reaffirmed<sup>33</sup> that "payment" in art 2033 referred not only to a sum of money but encompassed the fulfilment of every duty derived from a binding obligation, which *a posteriori* appeared not to be owed, and had as its purpose *un dare* or *un facere* on the basis of the *ratio* of arts 2033 *et seq.*

(ii) The payment by the *solvens* of an inexistent debt: As regards the second of the elements, the Corte di Cassazione affirmed<sup>34</sup> that the *condictio indebiti* presupposes the lack of any judicial relation between the parties or, at any rate, the undisputed definition of it without the continued existence of any binding obligation, in such a way that the payment made has as its cause the voluntary and unilateral act

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<sup>31</sup> There is an *indebito soggettivo* when the *solvens* pays the debt of another, while believing himself to be the debtor because of an excusable error on his part. Thus when the *accipiens* is creditor of a person other than the *solvens*. Article 2036 will not form part of the present study.

<sup>32</sup> "Whoever has made a payment which was not owing is entitled to the return of what he has paid. He is also entitled to the fruits and interest from the day on which payment was made if the person who received it acted in bad faith, or from the day of demand if the person acted in good faith."

<sup>33</sup> Cass. 2 aprile 1982, n. 2029: *Giust. civ. Mass.* 1982, 733.

<sup>34</sup> Cass. 8 febbraio 1943, n. 288: *Foro it. Rep.* 1943-45, *Indebito* n. 2.



of the *solvens*.<sup>35</sup> Moreover, jurisprudence has admitted several times<sup>36</sup> that the *indebitum* can be restituted as much when the cause of payment was inexistent from the start as in the case where the reason for the payment existed but subsequently ceased to exist.

The Corte di Cassazione<sup>37</sup> requires that the payment is made by the *solvens* with the intention of fulfilling an obligation. It is debatable, though, whether such *animus* implies the error of the *solvens*.

It has been held<sup>38</sup> that, according to traditional doctrine, the action founded on art 1237 of the 1865 Codice civile (now art 2033 of the 1942 Codice civile) has for its prerequisites the lack or subsequent failure or illicitness of the payment, without regard to the error of who has paid. On the other hand,<sup>39</sup> where a person presented for collection a cheque with an indication of the sum in figures different from that in letters, the bank, which had paid the larger sum, was held to be able (for the claim of *ripetizione dell'indebitum*) to prove by way of presumption the error committed in the act of payment.

Even doctrine is not decided on this point. Although

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<sup>35</sup> App. Torino 2 febbraio 1949: *Foro pad.* 1949, I, 565; App. Bologna 8 giugno 1948: *Foro pad.* 1948, I, 643.

<sup>36</sup> e.g. Cass. 7 febbraio 1962, n. 245: *Giust. civ.* 1962, I, 650.

<sup>37</sup> Cass. 10 febbraio 1953, n. 327: *Giur. it.* 1953, I, 1, 492;

<sup>38</sup> App. Milano 18 aprile 1947: *Foro pad.* 1947, II, 46.

<sup>39</sup> App. Torino 26 aprile 1948: *Foro it. Rep.* 1949, *Assegno bancario e assegno circolare*, n. 76.

certain writers maintain the necessity of the error,<sup>40</sup> many jurists consider that there is no need for such an element.<sup>41</sup> The Corte di Cassazione,<sup>42</sup> while affirming that the two previously mentioned elements are sufficient for the *condictio indebiti*, has excluded the necessity of a third requirement - *l'errore scusabile del solvens*.<sup>43</sup> This would tend to confirm those authorities which believe that the error of the solvens is not a necessary prerequisite for the funding of an action for restitution under CC art 2033.

Once the application of CC art 2033 is admitted in order to obtain reimbursement of taxes unlawfully demanded by the State, it is then necessary to admit, as a corollary, that the limitation period for commencing actions is the ordinary one for civil proceedings under CC art 2946, i.e. 10 years.

Although the right to reimbursement of duties in the field of customs law is founded upon the general principles contained in CC art 2033, this field is more closely regulated by statute.

(c) Restitution of sums levied in breach of EC law

The right to restitution of customs duties was most recently set out in the *decreto legge 30 settembre 1982*<sup>44</sup>

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<sup>40</sup> See e.g. Barassi *La teoria generale delle obbligazioni*, Vol II, at 367 et. seq. (1948); Casati & Russo, *Manuale del diritto italiano* at 720 (1947).

<sup>41</sup> See e.g. Sacco, *La buona fede nella teoria dei fatti giuridici di diritto privato* at 261 (1949).

<sup>42</sup> Cass. 30 dicembre 1968, n. 4089: *Giust. civ.* 1969, I, 2135.

<sup>43</sup> Excusable error of the solvens. See Bigiavi, *Giurisprudenze sistematica civile & commerciale* at 466-469 (1968).

<sup>44</sup> n. 688.

(converted into legge 27 novembre 1982).<sup>45</sup> Article 19 provides:<sup>46</sup>

Chi ha indebitamente corrisposto diritti doganali all'importazione, imposte di fabbricazione, imposte di consumo o diritti erariali, anche anteriormente alla data di entrata in vigore del presente decreto, ha diritto al rimborso delle somme pagate quando prova documentalmente che l'onere relativo non è stato in qualsiasi modo trasferito su altri soggetti, salvo il caso di errore materiale.

La prova documentale ... deve essere fornita anche quando le merci, in relazione alle quali il pagamento è stato operato, siano state cedute dopo lavorazione, trasformazione ....

Article 19 has itself been the subject of several judgments by Italian courts in the field of EC law.

When the question of its constitutionality was raised by the Corte di Cassazione, the Corte costituzionale in *Spa BECA c. Amministrazione Finanze*<sup>47</sup> held that the disapplication by a national judge of an internal norm incompatible with EC law was possible not only when the conflict arose with the EEC Regulations but also with preliminary rulings of the ECJ. It was stated<sup>48</sup> that the right to a refund, according to the jurisprudence of the ECJ, was the result and fulfilment of the law governing the abolition of customs duties.

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<sup>45</sup> n. 873.

<sup>46</sup> "Anyone wrongly paying customs duties, taxes on manufacturing, consumer taxes or any state taxes, including any payments made before the entry into force of this decree, is entitled to be reimbursed the sums paid provided he shows, by means of written proof, that the burden of the taxes paid has not been passed on at all to any third parties, except in cases where there has been a clear error.

Written proof ... must be provided even when the goods, with regard to which payment had been made, have been sold on after being processed, transformed...."

<sup>47</sup> Corte Cost. 23 aprile 1985, n. 113: *Giust. civ.* 1985, I, 1864.

<sup>48</sup> Note 47 at 1866.

In accordance with the judgment of the ECJ,<sup>49</sup> the decision points out that -<sup>50</sup>

incompatibile con il diritto comunitario [è] ogni disposizione legislativa nazionale le quale, in punto di presunzione o di condizione di prova, lasciasse al contribuente l'onere di dimostrare che i tributi indebitamente versati non sono stati trasferiti su altri soggetti, ovvero ponesse particolari limiti in merito alla prova da fornire, con esclusione di qualsiasi prova documentale.

Such position, the Corte costituzionale affirmed, was the duty -<sup>51</sup>

al giudice ordinario accertare, alla stregua dei criteri stabiliti dalla Corte di giustizia ... se il diritto al rimborso vada riconosciuto agli importatori, senza tener conto delle (*rectius* disapplicando le) qui censurate disposizioni della legge nazionale.

The Corte costituzionale, without touching the other questions of constitutionality, ascertained the existence of a contrast between national norms and those of the EC and held that it was for the national judge to disapply the national norm in question. In so doing, the court declared inadmissible the question of constitutionality of art 19 which had been raised by the Corte di Cassazione.

The first case to apply the principles declared in the

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<sup>49</sup> Case 199/82 *Amministrazione delle Finanze dello Stato c. SpA San Giorgio* [1983] ECR 3595.

<sup>50</sup> Note 47 at 1866: "Any national norm which, either on the point of presumption or during the trial period, leaves it to the tax-payer to prove that any tax unduly paid has not been transferred to other subjects, or sets particular limits with regards to the proof that must be submitted (with the exclusion of any documentary proof) is incompatible with EC law."

<sup>51</sup> Note 47 at 1867: "... of the ordinary national judge to establish by the same standard as criteria introduced by the ECJ ... if the right to the refund to importers is to be recognised, without taking into account the (*rectius* disapplying them) provisions of national law which are criticised above."

previous decision was *Amministrazione Finanze c. SO.PRO.ZOO*.<sup>52</sup> The company brought an action in the Tribunale di Trieste against the Finance Ministry seeking the reimbursement of taxes for sanitary inspection and statistical levies totalling Lire 17m. (plus interest) that it had paid on goods imported from third countries. It claimed that these administrative import levies were contrary to EEC Art 13 being charges having equivalent effect to customs duties.

The Tribunale accepted the reasoning of the company and condemned the State to repay the amount claimed because it had demanded such levies from the company, contrary to EC law, between 1966 and 1971 on cattle and sheep imports from Yugoslavia and Hungary.

On appeal, the Corte di appello di Trieste confirmed the decision of the lower court but varied the order as regards interest.

On further appeal to the Corte di Cassazione, the Finance Ministry submitted *inter alia* that the abolition of duties having equivalent effect to customs duties provided for by EC law did not concern imports from third countries. EEC Regs 804/68 and 806/68, which were directly applicable in the Member States, had implicitly abrogated all the preceding internal norms that used to provide for the imposition of taxes or measures of equivalent effect to customs duties between such States. Among such impositions were the sanitary taxes and statistical levies for which latter there had been a subsequent express legislative intervention<sup>53</sup> which had

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<sup>52</sup> Cass. 18 ottobre 1985, n. 5129: *Giust. civ.* 1985, I, 2979.

<sup>53</sup> *L.* 20 novembre 1982, n. 896.

definitively abolished the levies. Since the case concerned import of animal stuffs from outside the EEC, the EEC Regulations did not apply and there was therefore no basis for the company's claim.

The Corte di Cassazione rejected the claim and reaffirmed the judgments of the lower courts:<sup>54</sup>

Incidentando, pertanto, la disciplina dell'art. 19 sullo stesso diritto di difesa giurisdizionale dal *solvens*, diritto che la giurisprudenza comunitaria ha inteso garantire in modo assoluto in quanto il diritto al rimborso degli oneri indebitamente ricossi dall'amministrazione perché in contrasto con il diritto comunitaria (come le tasse di visita sanitaria e i diritti di statistica di cui si contende in questo giudizio) costituisce ed è considerato come una conseguenza ed un complemento del diritto alla del dazio doganale, garantito dall'ordinamento comunitario, deve ravvisarsi una incompatibilità assoluta tra l'art. 19 in esame e la disciplina comunitaria.

It was therefore held that the right to reimbursement of taxes wrongfully paid as taxes equivalent to customs duties (contrary to EEC Art 13) created consequences in the national order which resulted in the abolition of those duties. Moreover, each national provision that left the taxpayer with the burden of proving the non-transference or "passing on" to third parties of the wrongfully levied taxes or else that fixed the limits to the proof needed was incompatible with EC law. It was recognised, however, that the importer had a

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<sup>54</sup> Note 52 at 2984: "Therefore, the act of bringing into action the discipline of art 19 on the same right to legal defence of the *solvens*, a right which EC law intended as a law guaranteeing absolutely the refund of any charges unduly collected by the administration wherever they conflict with EC law (such as the taxes allocated to sanitary inspection and the rights of the statistical levies contended for in this judgment) constitutes and is considered a complement and consequence of the right to withhold customs duty, guaranteed by the EEC Regulations, should recognise an absolute incompatibility between art 19 in examination and the Community discipline."

right to reimbursement of the sanitary taxes and statistical levies according to CC art 2033 and restitution under art 19 of the *legge 27 novembre 1982* would be disapplied.

The disapplication of art 19, where its application would conflict with EC law, was affirmed in *Amministrazione Finanze c. ESSEVI spa*.<sup>55</sup> The case concerned the claim by a company for the reimbursement of duties levied in violation of EEC Art 95. The appellant administration submitted *inter alia* that the judgment of the lower court should be annulled by applying art 19 which provided for the retroactivity of *legge 27 novembre 1982* by which the reimbursement of customs duties unlawfully demanded was subordinated to proof that the relative economic burden had not been transferred. Since the necessary documentary proof had not been shown by the importing company, it was not entitled to restitution.

The Corte di Cassazione dismissed the appeal. It stated:<sup>56</sup>

Ne consegue che, dovendosi nella specie disapplicare (in toto) la norma dell'art. 19 per quanto riguarda la decisione del ricorso, la controversia va decisa esclusivamente sulla base della disciplina comunitaria che richiama il diritto interno e quindi sulla base della norma generale che regola la *condicio indebiti* (l'art. 2033 c.c.). Pertanto, la conclusione cui sul punto sono pervenuti i giudici d'appello che hanno accolto la domanda di rimborso della società importatrice, non merita alcun censura.

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<sup>55</sup> Cass. 16 aprile 1986, n. 2711: *Giust. civ.* 1987, I, 630.

<sup>56</sup> Note 55 at 637: "It follows that, having to disapply (in its entirety) the norm of art 19 with regards to the decision of the appeal, the controversy must be decided exclusively on the basis of the Community discipline which refers to the internal/national law and turns also to the basis of the general norm which regulated the *condictio indebiti* (CC art 2033). For this reason, the conclusion which the appeal court judges reached on this point, which accepted the claim for refund from the importing company, cannot be criticised."

Consequently, the decision of the lower courts to grant reimbursement was confirmed.

Accordingly where art 19 renders practically impossible the exercise of the right to *ripetizione dell'indebito* of duties imposed by national authorities in breach of EC law, such result is incompatible with EC law. The Italian judge is therefore obliged to disapply art 19 and instead base his decision exclusively on EC law: this refers back to national law and consequently on the basis of the general norm which regulates the *condictio indebiti*, viz. CC art 2033.



### (3) INTERIM RELIEF

Under Italian civil law, provisional remedies are generally available, *inter alia*, to safeguard the rights of the parties and to provide them with relief pending the conclusion of the principal proceedings.

The only one of the three types of provisional remedy,<sup>57</sup> which might be applicable, is urgent relief (*provvedimenti d'urgenza*<sup>58</sup>). It is available under the Code of Civil Procedure, art 700 and permits a court, in cases of imminent and irreparable injury and where there is no specific provisional remedy available,<sup>59</sup> to grant appropriate relief in order to render effective any future judgment on the merits. The necessary pre-requisites for a provisional remedy are the possible existence of the right claimed in the principal proceedings and a well-founded fear that, before the conclusion of the principal proceedings, the circumstances favourable to the enforcement of the alleged right will disappear. It would therefore seem that the litigant could claim interim relief against the public authorities.

However, on the basis of art 4 of the 1865 law,<sup>60</sup> concerning the abolition of the *contenzioso amministrativo*,

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<sup>57</sup> The other *provvedimenti cautelari* (provisional remedies) are (i) the so-called specific remedies, *viz.* sequestration, complaint of new work, complaint of feared damage and preservation of evidence; (ii) provisional remedies not explicitly so denominated which are scattered throughout the codes and special laws. For a fuller discussion on this area, see Capelletti & Perillo, *Civil Procedure in Italy* chap. 6 (1965).

<sup>58</sup> For a general discussion on this remedy see *Novissimo Digesto Italiano* 3rd ed., Vol XIV, at 444-467 (1967).

<sup>59</sup> See generally Capelletti & Perillo, *op. cit.* at 140 ff.

<sup>60</sup> L. 20 marzo 1865, n. 2248.

the application of CCP art 700 must be excluded. The 1865 legislation vested in ordinary courts the cognizance of disputes between the administration and subjects involving subjective rights and one of its main results was the power, given to the court, to refuse enforcement to illegal administrative action. As a corollary, though, the courts could not issue any order commanding or prohibiting the public administration to do or not to do, to change or revoke an unlawful act.<sup>61</sup>

Further, by art 7 of the 1865 law, the ordinary courts were forbidden from issuing orders to the effect of suspending the operation of administrative activities (of a private character) pending the judicial proceeding.<sup>62</sup> Consequently, the *provvidimento d'urgenza* cannot be invoked in any case against the public authority and so be used to suspend the effective operation of an administrative act.<sup>63</sup>

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<sup>61</sup> Galeotti, *Judicial Control of the Public Authorities in England and Italy* at 69 (1953).

<sup>62</sup> Galeotti *op. cit.* at 71.

<sup>63</sup> Note 58 at 457.

(4) DAMAGES

(a) Introduction

In Italy, governmental liability extends not only to public authorities but also to state hospitals and to public enterprises though not to private enterprises which perform public duties as contractors or in any other capacity: these are exclusively liable for their own torts.

Liability of the State is based on the Constitution, art 28 which also provides for a personal civil liability of functionaries and employees and of the public institutions (*enti pubblici*) vis-à-vis third parties for acts executed in violation of the latter's rights. Art 28 states:<sup>64</sup>

I funzionari e i dipendenti dello Stato e degli enti pubblici sono direttamente responsabili, secondo le leggi penali, civili e amministrativi, degli atti compiuti in violazione di diritti. In tali casi la responsabilità pubblica si estende allo Stato e agli enti pubblici.

As the Constitution speaks explicitly of civil liability, reparation of damage caused by the State and public institutions is not a question of public law. Rather the rules of civil law apply without any exceptions and cases are brought before the ordinary courts. Since the State is liable to the same extent as a private citizen or entity, its civil responsibility arises when a *fatto illecito* (tort) is derived from the action of the public administration.<sup>65</sup>

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<sup>64</sup> "Officials and employees of the State and of public bodies are directly responsible, according to the criminal, civil and administrative laws for acts committed in violation of rights. In such cases, civil responsibility extends to the State and to public bodies."

<sup>65</sup> See Alessi, *La responsabilità della pubblica amministrazione* 3rd ed. (1955); Alessi, 'Nuovi orientamenti in tema di responsabilità degli enti pubblici' *Riv. trim. dir. pubbl.* 1959, 736; Piccardi, 'Sulla responsabilità della pubblica

The action giving rise to responsibility can be an act or omission, an operation or transaction or some behaviour or conduct on the part of the public authority. Such deed must be illicit, viz. it must be forbidden by a norm which directly and immediately seeks to protect the individual. The mere illegality or inopportunity of the act is not sufficient - it is necessary instead to ascertain whether the victim's subjective right has been violated. Even though annulled by the administrative judge, those illegal or inopportune acts which do not injure any subjective right do not give rise to responsibility. Such responsibility can exist, however, not only by the violation of perfect subjective rights but also of weakened ones (*diritti affievoliti*).<sup>66</sup>

Where such illicit action is not connected with a pre-existing legal relationship, it is determined by reference to the breach of the general precept of *neminem laedere*.<sup>67</sup> One speaks, in this case, of extra-contractual liability, the general conditions of which are provided for by CC art 2043:<sup>68</sup>

Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.

In private law, responsibility presupposes that the illicit act is committed with *dolo* or with *colpa*. The *dolo* is the voluntary or conscious will to commit the illicit act,

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amministrazione e dei dipendenti pubblici' *Riv. amm.* 1963, 153.

<sup>66</sup> Landi & Potenza, *Manuale di Diritto Amministrativo* 5th ed. at 151 (1974).

<sup>67</sup> The term, lit. "to hurt no-one," is used in Italian law to describe extra-contractual liability.

<sup>68</sup> "Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages."

*i.e.* intent. The *colpa* is however the omission of a duty of diligence, care or prudence *i.e.* fault. The nature of fault is itself controversial: some authorities suggest that fault is established by the violation of any rule binding on the administration.<sup>69</sup> According to others, fault on the part of a legal entity is an impossible notion; the fault of the employee may only be imputed to the legal entity.<sup>70</sup> Galoppini<sup>71</sup> states, though, that the fault of the public authority is of mere theoretical importance, because if the administration is actually condemned to pay damages, the judgment is generally based on the connection between the tort and the public authority or on the real existence of the employment, and no question of administrative fault is examined. It is true, however, according to Galoppini, that judicial practice considers the fault of the public employee to be a condition of state liability.<sup>72</sup>

The responsibility of the public authority subsists provided that the violation of the subjective right has been proven. The formal and objective illegitimacy of any act of the public administration is, therefore, not sufficient on its own to create in the individual the right to acknowledgment of

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<sup>69</sup> Zanolini, *Corso di diritto amministrativo* 3rd ed., Vol I, at 342 (1958). Cass. 28 aprile 1961, n. 979: *Giur. it.* 1962, I, 1, 715; Trib. Roma 18 giugno 1962: *Tem. rom.* 1963, 352.

<sup>70</sup> Alessi, *L'illecito e la responsabilità civile degli enti pubblici* at 82 (1964). Trib. Venezia 3 giugno 1964: *Corti Bresc. Ven. Trieste* 1965, 45.

<sup>71</sup> Galoppini, *Int. Ency. Comp. L.* Vol. XI, chap. 4 s.v. *Governmental Liability in Tort* at s207 (1983).

<sup>72</sup> Cass. 30 novembre 1963, n. 3069: *Giust. civ.* 1964, I, 632; Cass. 13 luglio 1964, n. 1857: *Arch. resp. civ.* 1965, 328.

the administration's *colpa*.<sup>73</sup>

Moreover, jurisprudence generally makes a clear distinction according to which responsibility must be referable, on the one hand, to some conduct or behaviour on the part of the public authority and, on the other, to a formal act.

(b) Fault liability

(i) Liability for conduct

In *Venturi c. Amm. finanze Stato*,<sup>74</sup> after an assessment for "governmental revenue" had been annulled by a provincial tax commission, the Finance Administration - without any objectively justifiable reason - had retained the goods which it had seized from the presumed tax debtor. When the lower courts sought to investigate the fault of the administration, it appealed against such investigation. The Corte di Cassazione, in rejecting the appeal, stated that the illicitness of any conduct, which causes an indemnifiable damage, required not only a relationship of material causality but also that the conduct be psychologically imputable to the subject (CC art 2043). This fundamental principle also applied to the behaviour or conduct of the public administration, the *dolo* or the *colpa* of which had to be ascertained for the purposes of deciding the amount of compensation payable for damage suffered by the individual.

For the purposes of evaluating the fault of a public

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<sup>73</sup> Cass. 23 maggio 1946, n. 631: *Foro it. Rep.* 1946, *Responsabilità civile* n. 62.

<sup>74</sup> Cass. 2 maggio 1967, n. 814: *Giust. civ.* 1967, I, 1475.

authority that, through its behaviour, has caused injury to a third party, the ordinary judge is required to ascertain whether or not such conduct has been *colposo* according to the regulatory norms which govern the specific activity of the public authority. If such norms contain, however, only a general reference to common prudence or equivalent expressions, no particular appraisal is necessary on the part of the judge since he fulfils his duty merely by ascertaining the imprudence of the conduct.<sup>75</sup>

When exercising its discretion, the public administration is bound to observe the limits imposed by legal or regulatory norms of diligence and prudence. The ascertainment of the violation of such norms (where the violation has injured the victim's subjective right) re-enters the cognizance of the ordinary judge.<sup>76</sup> This was recently confirmed by the Corte di Cassione which stated:<sup>77</sup>

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<sup>75</sup> Cass. 4 gennaio 1978, n. 16: *Foro. it. Mass.* 1978, 4.

<sup>76</sup> Cass. 10 maggio 1974, n. 1329: *Foro it.*, 1974, I, 2686; App. Napoli 28 ottobre 1972: *Dir. e giur.* 1974, 131; App. Bari 12 dicembre 1973: *Arch. resp. civ.* 1974, 249.

<sup>77</sup> Cass. 8 maggio 1978, n. 2234: *Foro it. Rep.* 1978, *Giurisprudenza civile* n. 112: "The determination of criteria and the choice of means for the exercise of the activity carried out to satisfy certain public interests re-enter into the sphere of discretionary power of the public administration, but this power comes up against a limit in the principle of *neminem laedere*, which imposes on everyone, and thus on the public administration as well, the duty to observe in their line of conduct, whatever end they are directed towards, the norms of common prudence so that unjust damage to third parties through the injury to their subjective rights are avoided. Therefore, whenever an individual declares that he has suffered the injury/damage of a subjective right as a result of culpable action on the part of the public administration in its activity, the ordinary judge can verify the criteria used and the means chosen by the public administration in the execution of any action for the fulfilment of the public interest, with the object of ascertaining whether the criteria used and the means chosen

Rientra nel potere discrezionale della pubblica amministrazione la determinazione dei criteri e la scelta dei mezzi per l'esercizio dell'attività svolta per il soddisfacimento di determinati interessi pubblici, ma tale potere discrezionale incontra un limite nel principio del *neminem laedere*, che impone a chiunque, e perciò anche alla pubblica amministrazione, il dovere di osservare nei propri comportamenti, a qualunque finalità siano diretti, le norme della comune prudenza al fine di evitare danni ingiusti a terzi attraverso la lesione dei diritti soggettivi di costoro. Pertanto, ove un privato deduca di aver subito la lesione di un diritto soggettivo per effetto di un comportamento colposo della pubblica amministrazione nell'esercizio di un'attività amministrativa, il giudice ordinario può sindacare i criteri adottati e i mezzi scelti dalla pubblica amministrazione nell'esercizio dell'attività svolta per il soddisfacimento di un interesse pubblico, al fine di accertare se i criteri adottati e i mezzi scelti siano adeguati alle norme di comune prudenza, sì che il comportamento concreto della pubblica amministrazione nell'esercizio dell'attività amministrativa sia esente dall'elemento soggettivo della colpa.

(ii) Liability for a formal act

In respect of formal acts, both case law and prevailing doctrine previously agreed that, in order to establish the responsibility of the public authority, the objective illegality of the administrative act was sufficient (having been declared illegal by the competent court) without having to enquire into the subjective element of malice or fault on the part of the administration.<sup>78</sup>

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are adequate for the norms of common prudence, so that the actual conduct of the public administration is exempt from the subjective element of the *colpa*."

<sup>78</sup> Cass. 19 aprile 1956, n. 1177: *Giust. civ.* 1956, I, 1554; Cass. 6 maggio 1959, n. 1329: *Giust. civ.* 1959, I, 1926; Cass. 20 aprile 1961, n. 884: *Foro amm.* 1961, II, 366. Sandulli, *Manuale di diritto amministrativo* 9th ed. at 631 (1966).



For example, the Tribunale di Bologna affirmed<sup>79</sup> that the responsibility of the public authority, as a result of acts declared to be illegal, *presumed* the existence of fault on the part of the administration in the violation of some legal or technical norm or norm of good administration that had caused injury to a subjective right.

Further, the Corte d'appello di Firenze has stated<sup>80</sup> that the public administration is liable for all the damage caused by an illegal administrative act *per se*, since an enquiry into the existence or otherwise of the malice or fault of the administration is inadmissible.

Until quite recently, then, case law in accordance with prevailing doctrine had generally tended to accept the principle that ascertaining the illegitimacy and voluntary issue of an administrative act was sufficient from which automatically to derive the administration's responsibility, independent of any enquiry into the *dolo* or the *colpa* of the latter.<sup>81</sup>

However, the Corte di Cassazione<sup>82</sup> has recently held the contrary opinion that even in cases of injury to a subjective right deriving from an administrative act declared illegal, in order for the court to be able to affirm the administration's responsibility according to CC art 2043 (and therefore the right of the injured party to compensation for the resulting

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<sup>79</sup> Trib. Bologna 19 novembre 1956: *Giust. civ. Rep.* 1958, *Obbl. e contr.* n. 37.

<sup>80</sup> App. Firenze 2 marzo 1962: *Giust. tosc.* 1962, 611.

<sup>81</sup> Cass. 8 gennaio 1978, n. 16: *Giust. civ.* 1979, I, 1512.

<sup>82</sup> Cass. 29 giugno 1981, n. 4204: *Giust. civ.* 1981, I, 1893.

damage), the voluntary issue of the act is not sufficient but it is necessary rather that the injured party prove that the act had been issued with *dolo* or with *colpa*. Doctrine has also recently supported such a principle although this remains for the time being a minority view.<sup>83</sup>

(iii) Liability of civil servants

As has been shown above,<sup>84</sup> the State's responsibility for its own acts and those of its employees was set down in art 28 of the Constitution. The article on the one hand affirmed the direct responsibility of the civil servant and on the other extended the civil responsibility of the administration. The liability of the administration for the actions of the civil servant does not, however, have a character which is merely subsidiary or of guarantee (*i.e.* which only comes into play when the civil servant has been excused). The direct liability of the civil servant, on the contrary, must be kept separate from that of the public administration. Consequently, from an identical tortious act the responsibility can arise of both the civil servant and the administration, and the two actions for idemnity can be exercised cumulatively or separately.<sup>85</sup>

The civil liability of *funzionari* ("functionaries") and *dipendenti* ("employees") of the State is more closely

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<sup>83</sup> Sandulli, *op. cit.* 13th ed. at 1025 (1982).

<sup>84</sup> See *supra* at 244.

<sup>85</sup> Landi & Potenza, *Manuale di Diritto Amministrativo* 5th ed. at 301-302 (1974).

regulated by a separate law, *TU 10 gennaio 1957*<sup>86</sup> and its provisions will be examined briefly:

(A) Liability of civil servants for their own actions

For there to be liability, an act of the civil servant is required which must take concrete form: (i) in some behaviour commissive or omissive<sup>87</sup> in the exercise of powers conferred on him by law or regulation;<sup>88</sup> (ii) in an intentional element, established by *dolo* or by *colpa grave*;<sup>89</sup> and (iii) in a harmful event, consisting of the violation of the third party's right.<sup>90</sup>

The omissive action may consist of the omission or the unjustified delay of an act or operation, to the execution of which the civil servant is bound by law or regulation.<sup>91</sup>

The action must be committed in the exercise of powers conferred on the civil servant by law or regulation: actions committed in the capacity of a private individual are excluded. The deed has to be committed with *dolo* or with *colpa grave*:<sup>92</sup> the degree of *colpa* is the same already provided for the liability of administrators and clerks of

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<sup>86</sup> n. 3.

<sup>87</sup> Note 86, arts 22 and 25.

<sup>88</sup> Note 86, art 22.

<sup>89</sup> Note 86, art 25.

<sup>90</sup> Note 86, arts 22 and 23.

<sup>91</sup> Note 86, art 25. The omission must be ascertained, before the start of the proceedings for indemnity, within a period of just 30 days from notification by special notice.

<sup>92</sup> Note 86, art 22.

communes and provinces<sup>93</sup> and they are exempt from all but the most serious fault.<sup>94</sup>

(B) Liability of the administration for the actions of civil servants

Given the fact that under the 1957 TU the civil servant is only considered directly responsible if he has acted knowingly, or with gross negligence, imprudence or incompetence, it is not surprising that injured persons choose to sue the public administration. The liability of the particular public body is connected - apart from the case of deliberate will to inflict damage - with *any degree* of negligence, imprudence, or incompetence.

The general principle, set out in art 22, is that the action for indemnity against the civil servant can be exercised jointly with the direct action against the administration if, on the basis of existing legal norms and principles, the responsibility of the State also subsists. It does not appear, however, that direct action is the same as an action of direct responsibility - the expression concerns the passive subject of the claim for indemnity and not the heading of responsibility which latter may either be direct in relation to the acts of *funzionari* or indirect in relation to deeds of mere *dipendenti*.

The two actions ((A) and (B)) are, however, independent in themselves: the one can be exercised independently of the

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<sup>93</sup> TU 3 marzo 1934, n. 383, art 261.

<sup>94</sup> e.g. The driver of administrative vehicles is liable to some extent for his fault: L. 31 dicembre 1962, n. 1833.

other or they can both be exercised jointly.

(c) Non-fault liability

It is sometimes considered that the responsibility of the public administration can subsist independently of the illegality of the act: the examples usually cited are the indemnification for expropriation or for requisition which is owed, in spite of the fact that such acts were issued by the administration in conformity with the law.

Various doctrinal authorities<sup>95</sup> have affirmed that such acts cannot constitute cases of responsibility. On the one hand, the *fatto illecito* (tortious act) presupposes a relationship of obligation, the cause of which consists of the indemnification for *damnum injuria datum*. On the other hand, the compensation for expropriation, requisition, etc. is the object of a relationship of obligation which has a different cause: it consists of the duty to restore, for the benefit of the victim whose right has been affected, the equilibrium in property or assets which has been upset for the ends of the general interest. In fact, the indemnification for tort must always be compared to the whole value of the damage suffered; whereas the compensation can, according to the law, be commensurate with different criteria.

Such distinction between liability under CC art 2043 and art 46 of the law on expropriation for the public utility,<sup>96</sup>

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<sup>95</sup> e.g. Landi & Potenza, *op. cit.* at 294-295.

<sup>96</sup> i.e. Fault and non-fault liability under Italian administrative law.

has been discussed by the Corte di Cassazione, which stated:<sup>97</sup>

Non è possibile l'unificazione dell'azione aquiliana di cui all'art. 2043 cod. civ. e dell'azione di responsabilità per atti legittimi, fondata sull'art. 46 della legge sulle espropriazioni per pubblica utilità: le due azioni hanno diversi presupposti, differendo sia per il *petitum* (che nell'azione di risarcimento per fatto illecito si estende a tutto il pregiudizio derivato all'altrui sfera giuridico-patrimoniale e non soltanto al detrimento arrecato dall'esecuzione dell'opera pubblica al patrimonio immobiliare), sia per la *causa petendi*, e cioè per il fatto giuridico costitutivo dell'azione (che va ravvisato, nel primo caso, nell'illiceità del fatto e, nel secondo caso, invece, nella liceità della condotta della pubblica amministrazione).

Despite there being no general right to damages for the legitimate acts of the administration, as has been indicated above,<sup>98</sup> special statutes permit compensation when loss of property or of other rights is derived from the legitimate action of the public authorities. In fact, the Constitution guarantees by arts 42 and 43 that any expropriation in the general interest must be accomplished by the payment of an indemnity.<sup>99</sup>

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<sup>97</sup> Cass. 30 dicembre 1965, n. 2482: *Giust. civ. Mass.* 1965, 1257: "It is not possible to combine the *azione aquiliana* of CC art. 2043 and the action of responsibility for legitimate acts founded on art 46 of the law on expropriation in the public interest: the two actions have different presuppositions, and they differ both in the *petitum* (which in the case of compensation for torts extends to all prejudgments originating from the other judicial-patrimonial sphere and not only to damage caused by the administrative action to real property), and in the *causa petendi*, that is for the legal deed constitutive of the act (which must be seen, in the first instance, in the light of the illicitness of the act and, in the second instance, in the light of the lawfulness of the conduct of the public administration)."

<sup>98</sup> See *supra* at 254.

<sup>99</sup> Art 42: "....Private property, in such cases as are prescribed by law and with provisions for compensation, may be expropriated in the general interest."

Art 43: "For purposes of general utility the law may reserve in the first instance or transfer, by means of expropriation and payment of compensation, to the State, to

The special laws apply this principle to many instances including -

- (i) expropriation compelled on account of public utility;<sup>100</sup>
- (ii) expropriation and temporary occupation of immovable goods;<sup>101</sup>
- (iii) the requisition of movables;<sup>102</sup>
- (iv) the expropriation of industrial patent rights and of royalties when this is necessary for reasons of national defence;<sup>103</sup>
- (iv) the expropriation of exclusive fishing rights;<sup>104</sup> and
- (v) the surrender of concessions of public services.<sup>105</sup>

The act of the administration need consist not only of a decision reached under statutory powers but also of some material conduct.

(d) Damages for breach of EC law

This section of the chapter seeks to discuss the award of damages by Italian courts for breach of EC law by the public administration.

The first case under discussion is that of *Salgoil c.*

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public bodies... certain undertakings or categories of undertakings operating essential public services... and invested with a character of general interest."

<sup>100</sup> L. 25 giugno 1865, n. 2354, arts 1 et seq.

<sup>101</sup> Note 100 at arts 71 et seq.

<sup>102</sup> TU 31 gennaio 1926, n. 452.

<sup>103</sup> L. 16 ottobre 1924, n. 1828, art 2; RD 29 giugno 1939, n. 1127, arts 60 et seq.

<sup>104</sup> TU 8 ottobre 1931, n. 1604, art 25.

<sup>105</sup> TU 15 ottobre 1925, n. 2578, art 24.

*Ministero Commercio con l'estero*.<sup>106</sup> Proceedings were commenced by the plaintiff company which sought to test the legality of the conduct of the defendant Ministry through its refusal of an import licence. This conduct, it alleged, had made impossible the importation into Italy of 4,000 tonnes of decolourant fat materials which the plaintiff had already agreed to purchase abroad. It argued that the conduct of the Ministry was unlawful since it violated EEC Arts 31, 32 and 33.<sup>107</sup> In addition, the plaintiff claimed damages resulting from the failure to import the materials, such damages to be separately assessed.

In reply, the defendant Ministry argued that no such subjective right existed (a) in consideration of the prevailing public interest in matters of commercial trade; and (b) by virtue of the prohibition of importation of fat materials resulting from art 7 of *legge 13 novembre 1960*.<sup>108</sup> It consequently argued that the Tribunale di Roma had no jurisdiction.

In the judgment at first instance,<sup>109</sup> the Tribunale accepted the defendant's contention that it had no jurisdiction. The court maintained that the Treaty provisions were directly operative only in relations at an international level between Member States, whereas with regard to the different national legal jurisdictions that had only an

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<sup>106</sup> App. Roma 24 settembre 1969: *Giust. civ.* 1969, I, 1767.

<sup>107</sup> Which had been ratified in Italy by *L. 14 ottobre 1957*, n. 1203.

<sup>108</sup> n. 1407.

<sup>109</sup> 30 giugno 1966 and 6 ottobre 1966, unreported.



indirect effect, since there was rarely a coincidence between the primary interests of the State and the secondary concern of the private economic operations, such secondary interest manifesting itself by measures of liberalisation of commercial exchanges within the Community sphere.

The reason for rejecting Salgoil's arguments was not the reference to the individual Treaty provisions prayed in aid by that company but a general one arising from the double-barrelled argument that, on the one hand, as regards the internal systems, the Treaty merely contained "procedural requirements" and, on the other hand, the Treaty did not contain any regulations aimed at amending in a special manner subjective rights which might be created in favour of nationals by the general legal system of Member States.

On appeal by the plaintiff, the Corte d'appello di Roma considered that the argument between the parties entailed a problem of interpretation of the EEC Treaty provisions and accordingly referred the matter to the ECJ for a preliminary ruling. The reference sought to ascertain whether the Treaty provisions in question were effective in the relationships between a Member State and its nationals and, if so, the extent of the legal protection thereby ensured to the subjective position of citizens as regards the State.

In its judgment,<sup>110</sup> the ECJ held that a Community rule had the same binding force in all Member States and its legal nature could not be altered by the particular features of the national law of a Member State: in this respect, EEC Arts 31

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<sup>110</sup> Case 13/68 *Salgoil SpA v. Italian Ministry for Foreign Trade* [1968] ECR 453.

and 32(1)<sup>111</sup> had been incorporated into the internal legal systems of Member States and were directly effective therein.

From this preliminary ruling, the Corte d'appello sought to draw several consequences. The court wanted to underline the effects that the recognition of a Treaty norm (in the present case, EEC Art 31) as being directly effective had on the position of the individual *vis-à-vis* the internal legal order. It affirmed, in effect, that the ruling of the ECJ, according to which the interests of individuals were protected in a direct and immediate way, amounted to saying -<sup>112</sup>

il che val quanto dire in sè stessi e come posizioni soggettive proprie di essi titolari, e non come mero riflesso indiretto di una tutela direttamente ordinata a garanzia di interessi pubblici, affidati alla cura dello Stato in veste di pubblica amministrazione attributaria delle competenze relative al settore impegnato dall'attività regolata dalla specifica norma in discussione.

The decision continues by noting:<sup>113</sup>

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<sup>111</sup> But not the other Treaty provisions in question.

<sup>112</sup> Note 106 at 1773: "...which is tantamount to saying that they are protected for themselves, and as subjective situations of those who are entitled to them, and not as a mere indirect reflection of a protection primarily directed to guaranteeing the public interest and entrusted to the state as a public administration dealing with the attributions which are typical of the kind of activity which embraces the specific decision with which we are concerned."

<sup>113</sup> Note 106 at 1773: "It follows from this that the identification of a subjective right in favour of the citizen *vis-à-vis* the public administration, and the denial that the latter has any general power to affect such rights by reducing them on the ground of any public interest which it is considered ought to take precedence, inevitably lead to the conclusion that when deciding on the extent of jurisdiction in accordance with the criteria dictated by the internal legal system, we should assign to the ordinary courts jurisdiction in respect of any claim aimed at asserting the damage that it is assumed would be caused to an individual by an act on the part of the public administration which affects the said rights and which is brought into being in circumstances which do not qualify as situations which exceptionally should affect those rights."

Orbene la individuazione di una posizione di diritto soggettivo in capo al cittadino nei confronti della pubblica amministrazione ed il diniego a questa di un generale potere di incidere su quella posizione, menomandola, in contemplazione di un pubblico interesse giudicato preminente, conducono inevitabilmente, in sede di riparto delle giurisdizioni secondo i criteri del diritto, interno, ad attribuire al giudice ordinario la cognizione di una domanda volta a far valere le conseguenze dannose che si assumono venute al privato da un atto della pubblica amministrazione lesivo di quella utilità sostanziale e posto in essere fuori della ricorrenza delle situazioni eccezionalmente attributive del potere di affievolimento.

This affirmation appears to put into relief the fundamental characteristic of the Italian judicial order, according to which the recognition of a subjective right, in favour of the interested party, constitutes the condition precedent to the widest and most direct judicial protection and, consequently, to the possibility of guaranteeing (within the national framework) the concrete realisation of obligations incumbent on, *inter alia*, the public administration which derive from EC Treaty provisions.

To this juridical situation, *i.e.* to the existence of a subjective right, must be compared the contrasting situation characterised by a legitimate interest which is submitted solely to the protection afforded by the administrative courts, thereby escaping the sanction of the ordinary jurisdiction. The Corte d'Appello also wanted to highlight this distinction by noting that with regard to the lack of direct effect of EEC Art 33, the decision of the ECJ automatically included the refusal of competence by the ordinary courts over the case, precisely because it concerned in its entirety the legitimate interests susceptible to being

protected by the administrative jurisdiction alone:<sup>114</sup>

Quanto all'art. 33 in relazione all'art. 32 comma 2° ultimo inciso, nessun dubbio è possibile circa l'identificazione del contenuto sostanziale della tutela somministrata, secondo il giudizio della Corte di Lussemburgo, agli interessi dei singoli in ordine alla concreta attuazione della progressiva liberalizzazione degli scambi entro l'area comunitaria, voluta dal Trattato. La Corte ha infatti riconosciuto che gli Stati membri dispongono di una facoltà di valutazione idonea ad escludere, in tutto o in parte, l'effettivo adempimento degli obblighi sanciti nelle disposizioni in esame, essendo rimessa al loro discrezionale apprezzamento la determinazione precisa dei giudizi di valore quantitativi ai quali deve essere via via commisurata la progressione dell'attività liberalizzatrice realizzata dagli Stati stessi, ciascuno dei quali, quindi, si presenta investito di un potere di valutazione e di determinazione ampiamente discrezionale, in principio incompatibile - per pacifica regola del diritto nazionale - con la riconoscibilità di una contraposta situazione di diritto soggettivo in testa ai singoli soggetti privati dell'ordinamento.

In this respect, the decision accordingly appears to be of particular significance in so far as, by highlighting the clear distinction which exists between the situation of the party entitled to protection of a subjective right and the one entitled to protection of a legitimate interest, it precisely

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<sup>114</sup> Note 106 at 1772: "As concerns Article 33 by reference to Article 32 (para 2 last sentence) no doubt is possible regarding the identification of the substantive content of the protection which, in accordance with the judgment of the ECJ, is granted to the interests of individuals in order to ensure a progressive liberalisation of trade within the Community area, as the Treaty prescribes. The ECJ has in fact acknowledged that Member States can exercise a judgment which may exclude, in whole or in part, effective performance of the obligations imposed by the said provisions, in as much as there is left to their discretionary assessment a precise determination of the quantitative value judgments that have from time to time to ensure a progressive liberalisation by the Member States themselves, particularly since each of these Member States comes to the matter having power to make assessments and determinations on a fully discretionary basis; and on a basis which, as a matter of principle and as acknowledged by the national law, is incompatible with the recognition of an opposed subjective right for the subjects of the system itself."

identified the first with those of Community rules having the character of direct effect, and the second with the other rules.

The second case under discussion is the decision of the Corte di Cassazione in *Ministero Commercio con l'estero c. snc Colussi*.<sup>115</sup> In previous proceedings brought by the company,<sup>116</sup> the Consiglio di Stato<sup>117</sup> had annulled two ministerial decrees which had prevented Colussi from importing a mixture of flour with sugar (in measures less than 18%) on the grounds that such goods had been included in the list of "liberalised products" under EEC Art 31.<sup>118</sup>

The company then brought an action for damages against the Ministry on the grounds that the freedom to import goods from another Member State constituted a subjective right which was based on a combination of EEC Art 31 and the Constitution, art 41 (the general rule on the freedom of private economic enterprise). In the absence of an express legislative provision, the Ministry could not subject businesses to a regime of previously-licensed importation of goods which was then refused: such administrative act could be described not only as illegitimate, *i.e.* it breached a legitimate interest and could be annulled by the administrative courts, but also as illicit, *i.e.* it breached a subjective right, the remedy for which lay in an action for damages.

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<sup>115</sup> Cass. 4 agosto 1977, n. 3458: *Giust. civ.* 1978, I, 135.

<sup>116</sup> See *infra* at 290 for a full discussion of this part of the proceedings.

<sup>117</sup> The highest court of the administrative jurisdiction.

<sup>118</sup> As ratified by L. 14 ottobre 1957, n. 1203.

The Corte d'appello di Roma<sup>119</sup> condemned the Ministry to compensate the Colussi company for the damage it had suffered as a result of the unsuccessful attempt to import goods, due to the impediment caused by the public administration through the ministerial decrees (which had subsequently been annulled).

The Ministry objected to the ruling and appealed to the Corte di Cassazione. It submitted that (a) the judgment of the Corte d'appello was delivered under the profile of a defect in jurisdiction<sup>120</sup> since it sought to decide a dispute in the matter of legitimate interests which was outside the jurisdiction of the ordinary judge; (b) the principle according to which "private economic initiative is free" (Constitution, art 31) was not enough to give rise in the entrepreneur to a perfect subjective right for the unhindered importation of goods since such activity, permitted within the ambit of controls governing the discipline of foreign commerce, remained subordinate to the administration's power to limit the regime controlling imports in defence of the national economy, and therefore, to subject to licence the import of a defined good, without this being contrary to the Constitution, art 41; and (c) the simple issue of an administrative act, even if in conflict with a subjective right of a private individual, was not the basis of responsibility for the administration if it were not embodied in some behaviour (or *fatto illecito*) executory of such act and injurious of the subjective right. Although in the

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<sup>119</sup> 20 novembre 1972.

<sup>120</sup> CPC art 360.

present case there certainly existed an illegimate administrative activity (general controls on imports and the particular refusal of licences), there was no illicit behaviour by the administration because the goods had never been presented at the customs and their free importation had never been positively impeded.

The Corte di Cassazione held the Ministry's contentions to be unfounded. The court agreed with the company that once goods were included in the list of "liberalised products" duly notified under EEC Art 31, the Italian administration was no longer entitled to request the prior granting of an import licence for them - which it had refused - without arrogating to itself a power which it did not have and without, at the same time, violating both EEC Art 31 which had expressly forbidden such a system and, correlatively, the subjective right of the importing company. In fact, the unhindered import of goods was drawn from the Community norms which laid down directly effective provisions in the internal order of the Member States and were directly invocable by individual citizens, to whom the respective national jurisdictions could not deny the corresponding defence.<sup>121</sup>

It was such a defence, the court continued, concerning a perfect subjective right that the Ministry had degraded or weakened in the present case, by means of an inexistent power forbidden by law. The company was therefore entitled not only to the annulment of the injurious act but also the restoration by the administration of the violated right to the fullness of its original validity through the elimination of the prejudice

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<sup>121</sup> Note 115 at 138.

*medio tempore* which had occurred.

Accordingly, the Corte d'appello had made quite clear how the object of annulment was not merely the act of refusing the licence, the granting or denying of which was submitted to the power of the administration.<sup>122</sup> It was also and foremost the ministerial provision (*i.e.* the circular) that, arbitrarily, had imposed the burden of that licence for importation of goods which was previously unhindered. Using the words of the Corte d'appello di Roma, the Corte di Cassazione continued:<sup>123</sup>

Era stato questo provvedimento - poscia annullato dal Consiglio di Stato - a comprimere l'originario diritto soggettivo del privato e ad affievolirlo; sul suo annullamento si fonda la pretesa risarcitoria della società Colussi, che è, quindi, pienamente proponibile. [Infatti] i ministeri interessati, dopo essersi arrogati un potere, che non avevano, cioè quello di sottoporre a licenze l'importazione di una determinata merce (miscela di farina con zucchero in misura non superiore al 18%), le avevano negato la licenza stessa. Il danno deriva alla società Colussi dal collegamento dei due provvedimenti annullati dal Consiglio di Stato; la circolare 7 marzo 1960 n. 25 e il diniego della licenza....

The Corte di Cassazione, agreeing with the lower court, stated that both provisions were issued in violation of EEC Art 31 and were accordingly illegitimate to the degree of true

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<sup>122</sup> Note 115 at 138.

<sup>123</sup> Note 115 at 138-139: "It was this measure, (since annulled by the Consiglio di Stato) that restricted the argued right of the individual and weakened it; the claim for indemnity of Colussi founded on its annulment which is, therefore, completely viable. In fact the Ministers concerned, after having arrogated to themselves a power they did not have, namely the right to submit for licensing the importation of determined goods (a mixture of flour with sugar not measuring more than 18%), they denied the licence itself. The damages to Colussi derives from the coupling of the two measures annulled by the Consiglio di Stato: the circular of 7 marzo 1960, n. 25 and the denial of the licence."



and proper illicitness.

What was called into question in the case and characterised the subjective position of Colussi, was not only the company's interest with regard to a *facere* of the Ministry, viz. the issue of a licence (unjustly denied because the requirements had been arbitrarily laid down), but above all in the claim of a *non facere* on the Ministry's part, viz. the abstention from each unwarranted interference in the judicial sphere with the individual's recognised and guaranteed liberty to import. In such sphere fell the freedom to import goods which, on the basis of the Constitution, art 41 (the generic norm) and of EEC Art 31 (the specific norm), formed the content of a subjective right of the citizen, in respect of which the Ministry had to abstain from performing some positive or negative act which hindered the exercise of such right.

In reaching its decision, the Corte di Cassazione considered, *inter alia*, that an illicit deed (*fatto illecito* or tortious act) could be imputed to the Ministry if Colussi found itself in a situation where it was practically impossible to import the goods from abroad and present them to the customs authorities. It was indeed clear from the case that the company was unable to perform those operations (relating to money payment, valuing, etc.) necessary for putting into effect the actual import, from the moment that it had been prevented from doing so by the Ministry arbitrarily subjecting it to the obligation of a prior licence and by the

illegal refusal of it:<sup>124</sup>

Ed agli effetti della mancata utilizzazione dei beni acquistati all'estero - nel che appunto si concreta il "danno ingiusto" sofferto da chi aveva il diritto di importarli in Italia e in tale diritto fu leso dal comportamento ostativo della p.a. (art. 2043 c.c.) - il fatto illecito del ministero che ne vieta l'importazione, così impedendo l'arrivo delle merci alla linea di confine, e causa efficiente del danno non meno di quanto lo sarebbe, per le merci quivi giunte, il denegato passaggio alla frontiera da parte degli uffici doganali.

It accordingly held that the freedom to import goods from another Member State constituted a subjective right of the individual which was based on a combination of the directly effective EEC Art 31 and art 41 of the Constitution.

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<sup>124</sup> Note 115 at 140-141: "And in addition to the effect of the loss of the ability to use goods imported from abroad - it is precisely this which the 'unlawful damage' suffered by those having the right to import them into Italy is created and in this it was this right which was damaged by the apportionment of the public administration (CC art 2043). The illicit act of the minister which blocked the importation, thus impeding the arrival of the goods at the border, the denied passage to the border by the customs officials is the effective cause of the total damage to the goods at this point."

(5) CONDITIONS PRECEDENT TO BRINGING PROCEEDINGS IN THE  
ADMINISTRATIVE COURTS

This section seeks to discuss the conditions which must all be present before the administrative court can be seised of a case and examine its merits. These *condizioni di ricevibilità* may be stated as follows:

(a) Atto amministrativo

It is as a result of art 26 of the 1924 TU that judicial review is open- <sup>125</sup>

contro atti o provvedimenti di un'autorità amministrativa o di un corpo amministrativo deliberante, che abbiano per oggetto un interesse d'individui o di enti morali giuridici...

The *ricorso* is therefore reserved for administrative acts alone: those acts which are not of this character, e.g. acts of the legislative power, acts of parliamentary assemblies,<sup>126</sup> acts of judicial authorities, are not included. Jurisprudence applies the same solution to *decreti-leggi* (decree-laws) which, although issued by the executive, have the force of law.<sup>127</sup> On the other hand, other acts are deemed susceptible to the *ricorso in legittimità*, e.g. *decreti legislativi* (subordinate legislation)<sup>128</sup> and even acts of administrative authorities concerning the organisation of

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<sup>125</sup> "against acts or measures of an administrative authority or deliberative administrative body, which have as their object the [legitimate] interests of an individual or an entity having a legal personality."

<sup>126</sup> Cons. Stato 8 settembre 1898: *Foro it.* 1898, III, 105.

<sup>127</sup> Cons. Stato 3 marzo 1923: *Giur. it.* 1923, III, 114.

<sup>128</sup> The *ricorso* can only be founded, however, on the violation of the law - Cons. Stato 20 marzo 1952, n. 6: *Foro it.* 1952, III, 83 and 138.

judicial jurisdictions and the status of their personnel.<sup>129</sup>

The *ricorso* is not open against acts of government which is provided for by art 31 of the 1924 TU:<sup>130</sup>

Il ricorso al Consiglio di Stato in sede giurisdizionale non è ammesso se trattasi di atti o provvedimenti emanati dal Governo nell'esercizio del potere politico.

Doctrine formerly recognised such acts as those ordered by a political motive.<sup>131</sup> This broad criterion has now been abandoned and the generally accepted formula is that "qualificando atti politici quelli che sono rivolti a perseguire gli interessi e vitali dello Stato."<sup>132</sup> Acts of government will therefore include acts concerning the relationship of government and Parliament (decrees relating to sessions, nomination of ministers); and acts concerning the internal security of the State or international relations (treaties, declarations of war).

Moreover, the act need not be explicit: in some circumstances, the *ricorso* may be brought against an implicit act. The legislator has considered as an implicit decision of rejection susceptible to review, the action by the administration not to reply - within a certain period - to the *ricorso gerarchico* of which it is seised.<sup>133</sup> There is not a

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<sup>129</sup> Cons. Stato 19 giugno 1903: *Giust. amm.* 1903, I, 323.

<sup>130</sup> "Petition to the Consiglio di Stato in its legal/jurisdictional capacity is not admitted if it concerns acts or measures originating from the government exercising its political power."

<sup>131</sup> Guicciardi, *La Giustizia amministrativa* 3rd ed. at 201 (1957).

<sup>132</sup> Guicciardi, *op. cit.* at 201-202.

<sup>133</sup> TU 3 marzo 1934, n. 383, art 5.

more general provision. Case law has considered, however, that the silence or the abstention by the administration corresponds to a refusal when the authority's behaviour unequivocally manifests its attitude (in practice, the interested parties signify by means of bailiff that they expect the administration to reply within a certain period).<sup>134</sup>

(b) The definitività of the act

A particular condition of the subject-matter before the administrative courts is that the administrative act must be the definite expression of the public authority, i.e. the *provvedimento definitivo*. In terms of art 34 of the 1924 TU, review is only available against definitive acts:<sup>135</sup>

Quando la legge non prescrive altrimenti, il ricorso al Consiglio di Stato in sede giurisdizionale non è ammesso se non contro il provvedimento definitivo, emanato in sede amministrativa, sul ricorso presentato in via gerarchia....

This means that an individual cannot challenge an act, in order to have it annulled, unless all administrative remedies have been exhausted or have expired. Such exhaustion of administrative remedies is generally realised through the *ricorso gerarchico* (hierarchical review),<sup>136</sup> which

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<sup>134</sup> Cons. Stato 10 maggio 1955: *Foro amm.* 1955, I, 3, 267.

<sup>135</sup> "When the law does not prescribe otherwise, the petition to the Consiglio di Stato in its legal/jurisdictional capacity is not allowed if it is not against the definitive act originating from the administrative sphere on the petition filed through hierarchical review."

<sup>136</sup> Defined in DPR 24 novembre 1971, n. 1199, arts 1-6. This is the typical or general remedy available against every non-definitive administrative decision. It consists of the review of an administrative decision by a hierarchically superior administrative body.

presupposes that a person has been injured in his rights or interests by a non-definitive administrative measure. An interested party can appeal to a body which is, directly or indirectly, a hierarchical superior to that which issued the impugned measure. The superior body is then obliged to pronounce itself by a written and reasoned decision. This review serves to render definitive acts which would otherwise by non-definitive and which would not be able (without such *definitività*) to be made the object of a review by the administrative courts or by the extraordinary review by the Head of State.<sup>137</sup>

(c) *Interesse al ricorso*

In order to bring an action against an administrative act, an individual must possess an interest in the decision which may be qualified as being personal, direct and actual.

This new type of interest, *i.e.* the *locus standi* which concerns the procedure, must be distinguished from substantive interest (*interesse legittimo*) which is the term corresponding to the private right (*diritto soggettivo*) in actions brought before the ordinary courts. Any confusion between the procedural interest and the substantive interest is to be avoided since one is the right to ask for a particular remedy compelling the court to exercise its discretion as to whether or not to issue it, and the other and different thing is to obtain that remedy, *i.e.* to obtain recognition that the right or interest which the applicant claims to possess really exists.

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<sup>137</sup> See *infra* at 274.

The qualifications of procedural interest, as has been stated above, are threefold.

First, the interest must be personal, *i.e.* it must be an interest belonging specifically to the legal sphere of the subject who intends to apply. *Locus standi* in judicial review proceedings is therefore recognised only in the (supposed) holder of the particular private interest which has been infringed by administrative action. Consequently, unless expressly provided for by statute, the interest of the citizen (as such) in a lawful, regular and beneficial working of an administrative act does not generally give a sufficient *locus standi*. The restrictive attitude which is implied in the qualification of *personale* may be illustrated by several examples from the jurisprudence of the Consiglio di Stato in which the court held that the following had insufficient *locus standi* to object:

- (i) a ratepayer as to a decision of the local council appointing the medical officer;<sup>138</sup>
- (ii) a citizen as to the decision of the competent minister dissolving the local council of the *comune*;<sup>139</sup>
- (iii) a ratepayer as to a decision by the *Prefetto* permitting the *comune* to purchase a building;<sup>140</sup>
- (iv) a citizen as to an administrative decision which was contrary to the general interests (in that case, the protection of natural amenities) of the *comune* of which he was

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<sup>138</sup> Cons. Stato 5 luglio 1902: *Giur. it.* 1902, III, 346.

<sup>139</sup> Cons. Stato 2 febbraio 1906: *Giur. it.* 1906, III, 160.

<sup>140</sup> Cons. Stato 11 febbraio 1921: *Giur. it.* 1921, III, 153.

a member;<sup>141</sup>

On the other hand, however, the following was held to have sufficient standing: a licensee, rival in trade, as to the granting of a licence for the same trade<sup>142</sup> although the right to object was denied in the case of a licensee being in a trade quite different from the one to which the new licensee referred.

The second qualification of the *interesse al ricorso* requires that the interest be direct. The applicant must have suffered a prejudice as a result of the decision objected to in his right or interest, it being immaterial whether it is a pecuniary or a moral interest. The Consiglio di Stato has held<sup>143</sup> that there was a sufficient interest to object (even through a *curatore speciale*, a special agent) for a military officer, who was a prisoner of war, against the *note di qualifica* (report) containing *apprezzamenti ingiuriosi* (libellous evaluations) against him.

Finally, the interest must be *attuale* (actual or present). The encroachment complained of must have already occurred at the time when the application was made. It is impossible to bring a valid application for an encroachment which is only a mere possibility. Consequently no application can be made against *regolamenti*, which are statutory provisions not embodied in an Act of Parliament or in a kind of delegated legislation having the effect of a statute. Even

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<sup>141</sup> Cons. Stato 12 giugno 1914: *Foro it.* 1914, III, 248.

<sup>142</sup> Cons. Stato 8 febbraio 1935, n. 108: *Foro amm.* 1935, 111; Cons. Stato 30 aprile 1940, n. 268: *Foro it.* 1940, III, 8.

<sup>143</sup> Cons. Stato 2 giugno 1943, n. 191: *Riv. dir. pubbl.* 1943, II, 303.



though *regolamenti* take the form of administrative acts, they are not open to challenge by themselves. They may be attacked only in an indirect way when attacking the administrative decision or activity which put them in operation: it is only then that the individual can feel affected by the unlawful statutory provisions and it is at that moment that his interest to apply for a remedy becomes present.

(d) Alternative relief

Sometimes, recourse to an administrative remedy is an alternative to that of a judicial one.

This is true particularly of the *ricorso straordinario al Capo dello Stato*, the extraordinary review by the Head of State. According to the definition given to it by doctrinal authorities,<sup>144</sup> this is a remedy of general character instituted for the defence of both rights and legitimate interests of citizens injured by a definitive administrative act and aimed at obtaining (with a view to rectifying the irregularity), the total or partial annulment of the act. It is defined, most recently, in *DPR 24 novembre 1971*, art 8:<sup>145</sup>

Contro gli atti amministrativi definitivi è ammesso ricorso straordinario al Presidente della Repubblica per motivi di legittimità da parte di chi vi abbia interesse.

Quando l'atto sia stato impugnato con ricorso giurisdizionale, non è ammesso il ricorso straordinario da parte dello stesso interessato.

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<sup>144</sup> See generally Bosco, *Natura e fondamento del ricorso straordinario al Presidente della Repubblica* (1959).

<sup>145</sup> "Extraordinary review by the President of the Republic of final administrative acts is admitted for reasons of legitimacy on the part of the interested party.

When the act has been contested by jurisdictional review, extraordinary review is not permitted to the same interested party."

Since the Consiglio di Stato in the extraordinary review advises the Head of State and submits to him a reasoned decree for resolution of the appeal, art 8 indicates that such review prevents any recourse to the Consiglio di Stato in its judicial function.

(e) Time limit for commencing proceedings

According to art 36 of the 1924 TU,<sup>146</sup> the time limit for referring the act to the administrative courts is 60 days<sup>147</sup> although different limits are provided by special statutory provisions:<sup>148</sup>

Fuori dei casi nei quali i termini siano fissati dalle leggi speciali relative alla materia del ricorso, il termine per ricorrere al Consiglio di Stato in sede giurisdizionale e di giorni 60 dalla data in cui la decisione amministrativa sia stata notificata nelle forme e nei modi stabiliti dal regolamento, o dalla data in cui risulti che l'interessato ne ha avuta piena cognizione.

The same article indicates the starting point of the limitation period: notification of the act or the date at which the interested party had full knowledge of it.

With respect to persons directly concerned by the act,

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<sup>146</sup> Modified by *L. 8 febbraio 1925*, n. 88.

<sup>147</sup> It has sometimes been maintained that the *ricorso* against an act tainted with absolute nullity can be exercised without conditions of time limitation. Jurisprudence, however, is rather hesitant: see Cons. Stato 27 ottobre 1951: *Riv. amm.* 1952, 192; Cons. Stato 26 settembre 1952: *Riv. amm.* 1953, 270.

<sup>148</sup> "Apart from the cases in which the limitation periods are fixed by special laws relative to the subject-matter of the petition, the limitation period for those making a petition to the Consiglio di Stato (in its legal/jurisdictional capacity) is 60 days after the date on which the administration has notified its decision in the procedure and manner established by regulation or from the date on which it emerges that the interested party has had full knowledge of it."

the publicity is operated by means of notification. This takes place at the delivery of a copy of the act in accordance with the regulations of each administrative body - where there is no regulation, notification is made by a judicial officer or local council official.

In regard to the interested parties not directly concerned by the act, it is now generally accepted that the period can start to run from the moment of publication of the act either in the *Gazzetta Ufficiale* (the government's official journal) or the official bulletins of the prefectures, according to whether they are acts of central or local government.

Any irregularity in notification or publication of the act prevents the limitation period from running.

In default of publicity, the starting point results from the full knowledge of the act by the interested party. It is necessary to show that that party was able to have knowledge of *all* the elements of the act.<sup>149</sup> It is then up to the administration or to the party which has an interest in seeing the review declared inadmissible, to prove this knowledge.

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<sup>149</sup> Cons. Stato 10 luglio 1940: *Riv. dir. pubbl.* 1940, II, 597; Cons. Stato 30 maggio 1941: *Foro amm.* 1941, I, 2191.

(6) JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(a) Introduction

Having considered administrative liability, the remainder of this chapter is concerned with the possibility of review and annulment of acts by the administrative courts. The section will start with a brief discussion of the two different procedures for obtaining judicial review within the administrative court system. It will then seek to examine the conditions precedent for bringing judicial review and the grounds for such review, since these are common to both procedures. Finally, the section will conclude with an examination of several cases in which the annulment of an administrative act was sought on the ground that it breached some norm of EC law.

(b) La giurisdizione di legittimità

The "jurisdiction of legitimacy" of the Consiglio di Stato corresponds to the principle expounded by art 103 of the Constitution, according to which <sup>-150</sup>

Il Consiglio di Stato e gli altri organi di giustizia amministrativa hanno giurisdizione per la tutela nei confronti della pubblica amministrazione degli interessi legittimi e, in particolari materie indicate dalla legge, anche dei diritti soggettivi.

The basis of the *ricorso* in legitimacy rests in art 26, para 1 of the *TU 26 giugno 1924*<sup>151</sup> which states:

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<sup>150</sup> "The Consiglio di Stato and other bodies concerned with administrative justice safeguard the legitimate interests of public administration and even those subjective rights that are provided by law."

<sup>151</sup> n. 1054: "It is the duty of the Consiglio di Stato in its legal capacity to decide on petitions for incompetence, for abuse of power or for violation of laws, against acts or measures of an administrative authority or deliberative

Spetta al Consiglio di Stato in sede giurisdizionale di decidere sui ricorsi per incompetenza, per eccesso di potere o per violazione di legge, contro atti o provvedimenti di un'autorità amministrativa o di un corpo amministrativo deliberante, che abbiano per oggetto un interesse d'individui o di enti morali giuridici....

Two elements characterise this *ricorso* which, according to Italian doctrinal writers, are referred to as the *causa petendi* and the *petitum*:

(i) *Causa petendi*, i.e. the title on the basis of which the petitioner seises the Consiglio di Stato, can only be the injury of a legitimate interest. It cannot concern breaches of subjective rights which, except where determined by law, solely come within the jurisdiction of the ordinary courts.<sup>152</sup>

Within the ambit of the jurisdiction of legitimacy, the Consiglio di Stato can however have cognizance of subjective rights in an incidental way: in effect, this is a result of art 28 of the *TU 26 giugno 1924* which provides:<sup>153</sup>

Nelle materie in cui il Consiglio di Stato in sede giurisdizionale non ha competenza esclusiva ai sensi dell'articolo seguente, esso è autorizzata a decidere di tutte le questioni pregiudiziali od incidentali relative a diritti la cui risoluzione sia necessaria per pronunciare sulla questione

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administrative body, which have as their object the [legitimate] interests of an individual or an entity having a legal personality."

<sup>152</sup> Constitution, art 111.

<sup>153</sup> "In the cases in which the Consiglio di Stato in its legal capacity does not have exclusive competence to the sense of the following article, it is authorised to decide on all preliminary or interlocutory questions relating to laws which must be resolved in order to be able to pronounce on the central question of competence.

However, with regards to the above preliminary or interlocutory questions, the effectiveness of the judged matter remains limited to the principal question to be decided upon in the case."

principale di sua competenza.

Su dette questioni pregiudiziali e incidentali, tuttavia, l'efficacia della cosa giudicata rimane limitata alla questione principale decisa nel caso.

The same text rules out this solution, though, for questions concerning the State and capacity of private individuals which fall exclusively within the competence of the ordinary courts.

(ii) The *petitum*, i.e. the object of the request, can only be the total or partial annulment of the administrative act. The petitioner cannot, e.g., request an award of damages.

The *ricorso di legittimità* is general in character. It is open each time that an administrative provision undermines a legitimate interest, unless a statute otherwise designates a different jurisdiction. Moreover, the legislator cannot exclude this *ricorso* against certain acts or to limit the means of using it. In fact, the Constitution, art 113 provides that the jurisdictional protection of the administrative courts "non può essere esclusa o limitata a particolari mezzi di impugnazione o per determinate categorie di atti."<sup>154</sup> The Consiglio di Stato has concluded from this that all administrative acts can be attacked before it for *incompetenza*, *violazione di legge* and *eccesso di potere*.<sup>155</sup>

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<sup>154</sup> "Claims for protection of rights in matters of legitimate interest before the organs of normal or administrative justice are always allowed against decisions taken by the public administration.

Such jurisdictional protection *may not be exclusive or limited to special claims or to specific decisions.*" [Emphasis supplied.]

<sup>155</sup> Cons. Stato 29 ottobre 1954, n. 693: *Giust. civ.* 1955, II, 170.

(c) La giurisdizione in merito

In order to prevent a petitioner from being exposed to malice on the part of the administration, a *ricorso* to the administrative courts has been provided by art 27 of the TU 26 giugno 1924 and by different special laws. This *ricorso* is the *ricorso in merito*, for the judge must be able not only to annul the act attacked but also to reform it partially or totally.

Like the *giurisdizione di legittimità*, that *in merito* may only be used to defend legitimate interests since the administrative judge cannot be seised of a *ricorso* founded on a subjective right except as provided by art 28 of the TU 26 giugno 1924.<sup>156</sup>

Important differences, however, separate the jurisdiction of legitimacy from that in merit. First, whereas the *ricorso* of legitimacy is open against all administrative decisions of a general nature, the *ricorso* in merit is only possible in cases limited by law and specifically provided for by art 27 of the 1924 TU. Secondly, the judge ruling in merit can have cognisance not only of the *vizi di legittimità* of the act attacked but also the *vizi di merito* which allows him to appreciate the utility, the inopportunity, the suitability or even the equitable character of the act. Finally the judge in merit has wide powers at his disposal. He may modify the act either partially or totally as well as annul it.

As already indicated, the *giurisdizione in merito* exists only in circumstances provided for by law, most particularly by art 27 of the 1924 TU. The most important instance is that

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<sup>156</sup> See *supra* at 278.

afforded by para 4 of art 27 which provides:<sup>157</sup>

[D]ei ricorsi diretti ad ottenere l'adempimento dell'obbligo dell'autorità amministrativa di conformarsi, in quanto riguarda il caso deciso, al giudicato dei tribunali che abbia riconosciuto la lesione di un diritto civile o politico.

The case provided by this text is that of the express or implied refusal of the administrative authority to ensure the execution of the judgment. It presupposes that after formal notice by the interested party, the authority has refused to execute it or has remained silent for 30 days.<sup>158</sup>

Jurisprudence has extended this *ricorso* to another case, viz. that in which the administration after having started to execute the judgment, consequently adopts some concrete behaviour by which it manifests its intention to avoid the obligations deriving from the judgment.<sup>159</sup>

#### (d) Grounds for review

The grounds upon which administrative acts can be challenged before the administrative courts are laid down in art 26 of the TU 1924.<sup>160</sup> These *vizi di legittimità* are described in the formula "incompetenza, eccesso di potere, violazione di legge." This statutory provision, which encompasses the different cases in which an administrative act

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<sup>157</sup> "Petitions directed at obtaining the fulfilment of the obligation of the administrative authority to conform, with regards to the decided case, to the decided question of the court has recognized the breach of a civil or political right."

<sup>158</sup> TU 26 giugno 1924, art 27.

<sup>159</sup> Cons. Stato 31 ottobre 1962, n. 756: *Foro. amm.* 1962, I, 1191.

<sup>160</sup> This repeated a formula of the L. 31 marzo 1889 creating a fourth section of the Consiglio di Stato.



violates an objective legal rule, provided the starting point from which the Consiglio di Stato was able to develop its control over administrative acts. Before dealing with the grounds on which such acts can be annulled, brief mention must first be made of the *vizio*, *inesistenza*.

(i) *Inesistenza*

The *vizio* (or vice) which determines the nullity of an administrative act, consists of the inexistence of an essential element. The most important instance<sup>161</sup> is the case of inexistence of the subject and occurs when the person or the body, from which the act emanates, does not have the quality of an organ of the public administration.<sup>162</sup> The act done by the individual person or body is therefore not an administrative act. A particular case of this is instanced by the performance of an act by the usurper of public function.<sup>163</sup>

(ii) *Incompetenza*

This *vizio* is the fault affecting the subjective element of an administrative decision, viz. the public authority issuing it. In other words, an act may be challenged on this ground when it issues from an authority which is different from that which has the power of acting in the particular

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<sup>161</sup> The other cases discussed by doctrinal authorities are rather theoretical: see Landi & Potenza, *Manuale di diritto amministrativo* 5th ed. at 262-266 (1974).

<sup>162</sup> Cons. Stato 5 dicembre 1956, n. 1266: *Cons. di St.* 1956, I, 1413.

<sup>163</sup> CP art 347.

case. The fact that the authority is different from the competent one may be detected from different points of view:

- (a) *per materia*: the infringement by a minister of the sphere of activity of another minister;
- (b) *per grado*: the infringement by a hierarchical inferior of the authority of a superior body or vice versa;
- (c) *per territorio*: the application of an act in a territorial area which does not come under the author of the act.

Peculiar to the Italian system is the relevant distinction between a relative incompetence and an absolute incompetence.

The former occurs among bodies or organs belonging to the same branch of the administration, e.g. where the *prefetto* (the area officer of the central government) issues an act instead of his superior, the minister concerned, or instead of a *prefetto* of a different district. This merely makes the act voidable.

The latter, however, renders the act absolutely void. This happens when the decision is taken in a field which does not come under any administrative authority - the infringement of the competence of the executive by the legislative or judiciary (the so-called *straripamento di potere*). Also included under this category are cases of a severe lack of jurisdiction (which can occur within the executive itself) when the incompetent authority is so removed from the competent one that there is no connection between the two.

Absolute incompetence arises solely from an infringement

*per materia*. In a case before the Consiglio di Stato,<sup>164</sup> a local authority bye-law had been issued by an organ which did not have the power to issue it and without following the prescribed rules of procedure. The Consiglio di Stato held that although the prescribed approval by the *prefetto* was given to the act, this did not give it validity. The court stated that such a *regolamento* could not claim to be taken as an expression of the will of the public authority concerned: it could not therefore have any legal effect, being void at its roots and could not be considered as an act of that authority.

(iii) *Eccesso di potere*

(A) Definition

It is under excess of power that the administrative court examines whether the part of the act reserved for the exercise of discretion conforms to the negative or external limits which the law considers absolute. The first and most important of those limits is constituted by the public interest: where the administration is moved by considerations not only extraneous to the public interest as it is understood in a general sense but also to the specific public interest appropriate to that kind of act, the act will be vitiated by *eccesso di potere*.

A whole series of irregularities relating to the cause of an administrative act fall within the scope of excess of power. In order to simplify the task of the applicant - like that of the judge - the jurisprudence of the Consiglio di

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<sup>164</sup> Cons. Stato 26 luglio 1938, n. 444: *Foro amm.* 1938, 389.

Stato has accordingly defined a certain number of categories of *eccesso di potere* which represent typical and exemplary forms of this ground. Nothing prevents the interested parties and the judge, however, from appealing to the other forms of this *vizio*.

The most notable category for the purpose of the present study is *sviamento di potere* (misuse of power) which corresponds most closely to the French *détournement de pouvoir*.

(B) *Sviamento di potere*

An administrative act may be challenged on this ground when the public authority exercises its power in cases and for purposes other than those for which it was conferred by law. Consequently, even though the administrative decision may issue from the administration, within the boundaries of its province and in compliance with all legal requirements, it will be annulled on the ground of *sviamento di potere* if the decision is not in accordance with the purpose intended by law.

The case of *Spinolo c. Prefetto di Alessandria e Bolloli*<sup>165</sup> concerned a decree for compulsory purchase of land made by the Prefect for projected works to be built by a private company. It was successfully contended before the Consiglio di Stato that the object of the compulsory purchase was not one of public utility. The compulsory purchase was made in favour of a private owner of a factory for baking bricks and in respect of an adjoining farm, in order to enable

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<sup>165</sup> Cons. Stato 20 novembre 1940: *Foro amm.* 1941, I, 2, 21.

the factory to build development works. In stating his reasons for the purchase, the Prefect said that unemployment would have resulted from the factory's closure, which in turn would have arisen from the forbidden development of the factory. The Consiglio di Stato stated, however:<sup>166</sup>

Ma ciò che soltanto può giustificare la espropriazione, secondo la lettera e lo spirito della legge, e la obbiettiva utilità pubblica dell'opera o della industria considerata, in sè stessa, non già quella del mezzo o di uno dei mezzi adoperati per costruirla od esercitarla, quale appunto la mano d'opera. In altri termini, sebbene sia cosa di alto interesse pubblico evitare la disoccupazione operaia, ciò non basta a trasformare in opera di utilità pubblica quella di carattere e di interesse privato che assorba un notevole contingente di lavoro manuale. Se così non fosse, si arriverebbe all'assurdo che qualsiasi grande lavoro intrapreso da un privato nel proprio esclusivo interesse potrebbe autorizzarlo ad espropriare altri privati cittadini.

Whether the administration has exercised its powers *bona* or *mala fide* has no bearing on the existence of *sviamento di potere* since it is sufficient that the authority has pursued an object different from the one permitted by law. Nor does the way in which the existence of the ground is disclosed have any relevance: it may be apparent on the face of the proceedings being stated in the reasons for the act, or it may be detected only by supporting evidence.

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<sup>166</sup> Note 165 at 23: "The only thing that can justify the compulsory taking of property, according to the letter and the spirit of the law, is the actual public utility of the proposed works or industry, nor that of the instruments or some of the instruments employed to build it or to maintain it. In other words, though it may be in the highest degree for the public good to avoid unemployment, that is not enough to change into a work of public utility what is mainly of private character, though absorbing a certain number of manual workers. If it were not so, we should arrive at the absurdity, that any sort of large scale works undertaken by a private individual, in his own exclusive interest, could empower him to take compulsorily the property of other private citizens."

Moreover, the different object may be openly declared or concealed under a pretence of the law which alone is legally permissible. For instance, in *Lo Franco c. Bernalda*,<sup>167</sup> a civil servant was dismissed, ostensibly for reasons connected with the improvement of the civil service, when, under the pretence of such an act, it was really intended to cover a disciplinary order thereby removing the better safeguards afforded to the civil service by the special procedure for any disciplinary order. The dismissal was therefore annulled because it was *sviamento di potere*.

Further, it is irrelevant whether the different purpose was in itself lawful or unlawful. In *Pecora c. Comune di Polissena*,<sup>168</sup> a closure order made by the manager, declaring unfit for habitation a house which was let to the same public authority, was held to be unlawful on this ground, though the object of such an order was to the obvious advantage of public funds. The result of the closure order would in fact have been the immediate termination of the tenancy agreement with the consequence of putting the responsibility for the termination on the private landlord and thus making him liable for damages to the Commune, his tenant. Therefore, although the purpose pursued by the public authority in its action was lawful (taken by itself), of a public character and to the financial advantage of the authority, because it was at variance with that allowed or set down by law, it amounted to misuse of power.

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<sup>167</sup> Cons. Stato 8 aprile 1936: *Foro it.* 1936, III, 145.

<sup>168</sup> Cons. Stato 21 giugno 1940: *Foro amm.* I, 2, 253.

(iv) *Violazione di legge*

This last *vizio* appears to be rather residual,<sup>169</sup> *incompetenza* and *eccesso di potere* encompassing most of the cases of illegality. Unlike *eccesso di potere*, the breach of law can be ascertained merely by testing the administrative act on the basis of all legal provisions which apply in a general or in a particular way to the case. The act may be challenged on this ground either because the authority was wrong in supposing a provision to be in force which had been repealed or as repealed a provision which was still in force, or because it misdirected itself in interpreting or applying the provision. If the breach of law concerns the very rules regarding the competence of the particular authority, however, then the head of the attack becomes *incompetenza*.

The word *legge* in the term "violazione di legge" must be understood in a very comprehensive sense. It includes not only written rules such as the Constitution, statutes, regulations and the various types of delegated and subordinate legislation, but also unwritten rules, *i.e.* customary rules and those of particular sources of law known as *i principi generali di diritto* (general principles of law) and *analogia* (analogy).<sup>170</sup>

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<sup>169</sup> Giannini, *La giustizia amministrativa* at 152 (1964).

<sup>170</sup> The meaning of this term is to the effect of extending, by analogy, the principles governing the law of certain matters to analogous matters or situations, for which there is no express regulation.

(e) Annulment of administrative acts for breach of EC law

This section seeks to provide an outline of the effect of Community norms on the various national administrative measures.

The effect of EEC Treaty Articles and directly applicable EEC Regulations seems to be quite clear and depends on whether the conflicting internal administrative acts antedate or postdate the Community provisions.<sup>171</sup>

If the administrative act was issued before the entry into force of the EEC Treaty, the supervening law of execution<sup>172</sup> would have the effect of abrogating such acts to the extent that they are contrary to Treaty norms. These acts would be susceptible to annulment by the administrative courts on the grounds of *violazione di legge*.

As regards those acts issued after the coming into force of the Community norm, the ascertainment of their opposition to such a norm usually leads to the ascertainment of a *vizio* of legitimacy, i.e. they are annulable acts and continue to have effect until a decision annulling them is made. Annulment can be attempted on the ground of *violazione di legge* whenever the *vizio* is capable of violating a Community norm. With regard to acts which are an expression of the discretionary power of the administration, one would typically be able to invoke the ground of *eccesso di potere* in seeking the annulment of such an act.

The seminal judgment of the Consiglio di Stato, in which

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<sup>171</sup> Monaco, *Diritto delle Comunità Europee e Diritto Interno* at 165-167 (1967).

<sup>172</sup> L. 14 ottobre 1957, n. 1203.



it annulled an administrative act for contravening a Community norm, is *Società Biscotti Panettoni Colussi di Milano c. Ministero del Commercio con l'Estero*.<sup>173</sup> The plaintiff company applied to the Italian Ministry of Foreign Trade for a licence to import flour containing various percentages of sugar. On the basis of the different national provisions within the area of law on imports -circulars, regulations and decrees - the Ministry made a ruling, refusing the company's application.

The company appealed challenging the lawfulness of the refusal on the grounds that it violated norms of the EEC Treaty. It submitted, *inter alia*, that with regard to the refusal in respect of goods of type beta I (*i.e.* those having a sugar content of lower than 18%), the appeal had to be allowed since this was a product of the type appearing in the list that had already been notified pursuant to EEC Art 31.

In reply, the Ministry submitted that the undertakings under the EEC Treaty gave rise to obligations only amongst the Member States themselves and could not create legal rights in favour of nationals of those States.

After having noted that the product in question, for which the import licence had been refused, was included on the list notified in pursuance of EEC Art 31 (which prohibited new qualitative restrictions) and that no further internal regulation was necessary to apply that Article, the Consiglio

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<sup>173</sup> Cons. Stato 7 novembre 1962, n. 778: *Foro it.* 1963, III, 143.

di Stato recognised:<sup>174</sup>

Infatti con la ratifica ed esecuzione del Trattato di Roma suddetto è stata recepita nel nostro ordinamento la norma, che preclude una modifica alla liberalizzazione delle merci consolidate ai sensi dell'art. 31, per cui il cittadino, che venga direttamente leso da un rifiuto di importazione (in base a sopravvenuta circolare ministeriale), ha interesse a far valere il vizio di tale provvedimento e della circolare su cui si basa, in difetto di una norma di legge che autorizzi tale limitazione.

Del resto lo stesso Trattato della Comunità economica europea prevede che norme del Trattato possano essere invocate non solo da Stati membri o da organi o istituzioni della Comunità, ma anche da persone giuridiche e fisiche interessate (es. art. 173, 2° comma)....

Va, pertanto, riconosciuta l'illegittimità della sottoposizione a licenza d'importazione della merce beta I e, di conseguenza, del provvedimento 24 novembre 1960.

The Consiglio di Stato accordingly annulled the refusal of the Ministry to issue a licence and quashed the import restriction (based upon certain circulars, ministerial decrees and regulations) on the ground that it contravened EEC Art 31 and were therefore unlawful.

From this decision it is apparent that where administrative acts breach norms contained in the EEC Treaty Articles or Regulations, they may usually be annulled on the

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<sup>174</sup> Note 173 at 145-146: "In fact, by ratifying and executing the EEC Treaty, there has been incorporated into our legal system the rule which prevents any change in the liberalisation of goods consolidated in pursuance of Article 31, wherefor the individual who is directly affected by any refusal of import licence (in pursuance of a subsequent Ministerial Circular) is entitled to impugn such ministerial ruling and the circular upon which it is based, in the absence of a law authorising such limitation.

Furthermore, the EEC Treaty envisages that its regulations might be invoked not merely by Member States and by bodies or institutions of the Community but also by any interested person, whether natural or juristic (see, for instance, Article 173 (2))....

One must therefore allow that submitting to licence the import of goods of beta I type, and the consequent regulation of 24 November 1960, were unlawful."

ground of *violazione di legge*.

The situation is rather different, however, when the impugned act violates another type of Community norm, *viz.* the EEC Directive: the remainder of this section will centre on a discussion of the position of EEC Directives before Italian administrative courts.

In Italy, directives became part of the internal system either by means of *leggi* or *decreti legislativi* (delegated legislation)<sup>175</sup> or even by executive provisions which are usually in the form of ministerial decrees. The instrument most used is the *decreto legislativo*. In the absence of implementing provisions, Italian administrative courts<sup>176</sup> refuse to give any internal recognition to directives, even if certain provisions have been declared to be of direct effect by the ECJ. Such an attitude may be seen throughout Italian administrative jurisprudence.

In *Isabella c. Ministero Sanità*,<sup>177</sup> the Consiglio di Stato was faced with the question of the legitimacy of an administrative provision with respect to a directive. A *decreto* of the Health Minister, putting restrictive measures on the import of pork, had been impugned before the Consiglio di Stato which was requested to annul it for several reasons, *inter alia*, the violation of norms contained in a

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<sup>175</sup> A *decreto legislativo* is a decree based on one of the laws of delegation, periodically approved by Parliament precisely for the execution of Community law.

<sup>176</sup> Like the ordinary courts and French administrative courts.

<sup>177</sup> Cons. Stato 21 giugno 1968: *Dir. scambi internaz.* 1968, 529.

directive.<sup>178</sup>

According to the plaintiffs, the ministerial provision would have been illegitimate for not having applied correctly the norm contained in the directive which governed, among others, the adoption by national authorities of prospective measures restricting importation:<sup>179</sup>

i ricorrenti ... sostengono che detta direttiva avrebbe precluso al Ministero della sanità di adottare un provvedimento di carattere generale ed indiscriminato quale quello impugnato.

The plaintiffs' recourse regarding the conformity of the impugned decree to the directive, was rejected by the Consiglio di Stato on the following grounds:<sup>180</sup>

Non si può sostenere che il Ministero della sanità abbia emanato un provvedimento indiscriminato, senza tener conto della normativa comunitaria, in quanto, come si è visto, l'Amministrazione differenziò la situazione dei vari paesi, adottando per alcuni di essi provvedimenti particolari, e si preoccupò di coordinare le misure eccezionali ... con l'art. 9 della direttiva comunitaria 26 giugno 1964, il quale, come si è già detto, consente espressamente misure del genere [e ancora] ... risulta che l'ordinanza impugnata non aveva per scopo di eludere le norme comunitarie....

The statement of such reasoning centred upon verifying

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<sup>178</sup> EEC Dir 64/432.

<sup>179</sup> Note 177 at 530: "The plaintiffs maintain that the above mentioned directive would have prevented the Minister for Health from adopting a general and indiscriminate provision such as the contested one."

<sup>180</sup> Note 177 at 530: "It cannot be maintained that the Minister for Health has issued an indiscriminate provision without taking into account the EEC body of legislation, because, as was actually the case, the Administration differentiated the situation in various countries and adopted provisions particular to some of them, and made sure they co-ordinated exceptional measures with art 9 of the EEC directive of 26 June 1964, which, as we have already said, expressly permits this kind of measure with the result that the impugned decree does not have as its aim the eluding of the Community norms."

the legitimacy of the act, the object of the *ricorso*, in respect of the provisions contained in the directive. This reasoning underlined the conviction of the Consiglio di Stato, according to which only after the enactment of implementing provisions could the directive be recognised as having internal effect as an act capable of creating norms governing the exercise of power by the administration and thereby creating legitimate interests in favour of individuals.

A more recent case, *Associazione italiana Fondo Mondiale per la Natura c. Regione Marche*,<sup>181</sup> concerned the effect of a directive on a regional administrative act.

The Italian section of the World Fund for Nature contested the *calendario venatorio* (hunting calendar) of 1984-1985 which fixed the start of the shooting season during the period in which some birds would be nesting and others would be migrating to their nesting grounds. The calendar had been approved by the Marche Regional Council. The plaintiff association deduced from the calendar that its provisions would violate the norms of the international convention for the protection of birds, "the Paris convention";<sup>182</sup> the norms of the Berne convention;<sup>183</sup> as well as the EEC Directive<sup>184</sup> concerning the conservation of wild birds.

The association maintained that both the conventions and the directive had full perceptive effect and immediate

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<sup>181</sup> TAR Marche 10 aprile 1985: *Foro amm.* 1985, I, 1976.

<sup>182</sup> Dated 18th October 1950, to which Italy adhered by L. 24 novembre 1978, n. 812.

<sup>183</sup> Ratified by L. 5 agosto 1981, n. 503.

<sup>184</sup> EEC Dir 79/409.

application in the internal order of Member States. As a result the Marche Region, in approving the hunting calendar under discussion, ought to have conformed to the cited norms and in particular to the directive; and this was based on two decisions of the Corte costituzionale<sup>185</sup> and the provisions of EEC Art 189. Indeed, in one of those decisions, the Corte costituzionale had stated that directives -<sup>186</sup>

A differenza dei regolamenti, secondo il disposto dell'art. 189 n. 3 tr. di Roma, vincolano lo stato membro cui sono rivolte per quanto riguarda il risultato da raggiungere, salva restando la competenza degli organi nazionali in merito alla forma e ai mezzi.... Tali direttive, peraltro, di regola, vengono emanate come strumenti di coordinamento ed armonizzazione della legislazione e dell'azione amministrativa degli Stati membri a cui vengono indirizzate, per il conseguimento di obiettivi comuni. Esse si rivolgono dunque generalmente agli Stati, non ai soggetti dei loro ordinamenti interni e richiedono, per l'attuazione nell'ambito di questi ordinamenti, l'intervento degli Stati, i quali sono conseguentemente tenuti ad adottare, nei termini stabiliti dalle direttive, i provvedimenti legislativi, regolamentari o amministrativi idonei al raggiungimento dei risultati prescritti.

The defendant observed that the judgment dealt

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<sup>185</sup> Corte Cost. 14 luglio 1976, n. 182: *Giur. cost.* 1976-1977, 170 and 1673; Corte Cost. 5 giugno 1984, n. 170: *Giur. cost.* 1984, 1098.

<sup>186</sup> Corte Cost. 14 luglio 1976, n. 182: *Giur. cost.* 1976-1977 at 170: "Unlike a regulation, a directive shall, under the terms of the third paragraph of EEC Art 189, be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods .... Moreover, directives are, as a rule, issued as instruments for co-ordinating and harmonizing the legislation and administrative action of the Member States to which they are addressed, in the pursuit of common objectives, the choice of form and methods being left to the national authorities. In general, therefore, a directive is addressed to a State, not to those subject to its laws, and its implementation under these laws requires action by the State which is, in consequence, bound to adopt, within the limits laid down in the directive, the appropriate legislative, regulatory or administrative measures for the attainment of the results prescribed."

exclusively with EEC Regulations and confirmed the force and capacity of such Community norms to prevail over and to be superimposed upon the norms of Member States. It further submitted that (a) directives could not prevail over internal norms until the Member State had adopted the proper measures of implementation; and (b) according to art 6 of *DPR 24 luglio 1977*,<sup>187</sup> a directive could only be received into the regional order by means of a national law which fixed the principles and criteria to which the regions had to conform.

The TAR Marche found, upholding the defendant Region's submissions that -<sup>188</sup>

Conseguentemente, non potendo la direttiva comunitaria, finché lo Stato membro non avrà adottato le proprie norme di attuazione, prevalere sulle norme dell'ordinamento interno dei singoli Stati membri, la pubblica amministrazione dovrà avere riguardo a queste ultime e soltanto ad esse.

Del resto la non immediata efficacia delle direttive CEE nel caso di specie, appare confermata dalla dizione letterale "gli Stati membri adottano le misure necessarie per ..." contenuta in molti articoli della direttiva CEE n. 409 del 1979 e dalla possibilità di deroga degli art. 5, 6, 7 e 8 prevista dal successivo art. 9.

In the case in point, EEC Dir 79/409, concerning the conservation of wild birds, had been given effect in Italy

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<sup>187</sup> n. 616.

<sup>188</sup> Note 181 at 1978. "Consequently, the Community directive not being able to prevail over the norms of the internal regulations of the individual member states, since the member state has not adopted the proper measures of implementation, the public administration must have regard to the domestic measures and them alone. On the other hand, the less than immediate effectiveness of the EEC directive in such a case appears to be confirmed by the quotation 'the member states shall adopt the measures necessary for...' contained in many articles in the EEC Dir 79/409 and by the possibility of derogation from articles 5, 6, 7 and 8 as provided for by the following art 9."

through the *DPCM 4 giugno 1982*,<sup>189</sup> which had, *inter alia*, struck off different species of birds from those capable of being hunted:<sup>190</sup>

Considerato anche che la suddetta riduzione della pressione venatoria nei confronti di alcune specie coincide con la indicazione della direttiva comunitaria 2 aprile 1979 n. 79/409 concernente la conservazione degli uccelli selvatici.

The TAR Marche maintained, accordingly, that the sole parameter of reference for establishing the legitimacy or otherwise of the impugned regional hunting calendar was the above-stated decree of the President of the Council of Ministers which had modified the list of species which could be shot.

Since the presumed violations of the directive did not exist and the fact that the calendar did not contravene either of the international conventions, the applicant's claim could not be admitted.

In the light of these cases, it is then necessary to consider what consequences must follow from the non-conformity of the act of execution to the directive. The usual case, as has been stated,<sup>191</sup> will be that in which the non-conforming provisions are contained in a *decreto legislativo* - its compatibility would be challenged before the Corte costituzionale given that court's jurisdiction to check the legislative activity of the government within the limits of

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<sup>189</sup> *DPCM 4 giugno 1982: Gazz. Uff. 8 giugno 1982, n. 155.*

<sup>190</sup> "Whereas also that the above mentioned reduction in the pressure that hunting of certain species coincides with the instruction in the EEC Dir 79/409 concerning the conservation of wild birds."

<sup>191</sup> See *supra* at 292.



the delegation.

If the incompatibility concerned an administrative act, it would then be necessary to distinguish the case in which the act was issued by virtue of a power hierarchically conferred by law on the administrative organ (of a power not conferred for the objectives of adaptation to Community law) from the normal case in which the organ acts by virtue of a power expressly attributed to it in order to fulfil the directive.<sup>192</sup>

The first case refers to the possible direct effect of the directive and the non-compatibility of the act of execution to the directive which would give rise to the *vizio di eccesso di potere* only if the principle of the direct application of the EC norm were to be accepted.<sup>193</sup> In the second case, it will be simple to regard the administrative act as being vitiated, given that the organ, by wandering from the directive, acts for ends different from those for which the power was conferred on it. In case the directive touches a matter which internal law leaves to the public authority's discretion, its inobservance on the part of the administration ought to be invocable as a cause of *eccesso di potere*.<sup>194</sup>

There are, however, certain circumstances in which a directive, considered to be directly applicable,<sup>195</sup> is capable of creating legitimate interests in favour of

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<sup>192</sup> e.g. *DL 30 dicembre 1969*, n. 1335, art 1.

<sup>193</sup> But this has not been accepted by the Corte costituzionale: see Notes 185 and 186.

<sup>194</sup> Conforti, 'Sulle Direttive della Comunità Europea' *Riv. internaz. priv. proc.* 1972, 225 at 232-237.

<sup>195</sup> Like an EEC Regulation: see *supra* at 9.

individuals who may invoke the provisions of such a directive before the national courts.

Those directly applicable provisions, in fact, often require the public administration to fulfil certain administrative activity by reference to the directive itself as the sole direct and immediate discipline. In such a way, these provisions pose as *norme di azione* for the administration, apt to create in favour of individuals legitimate interests. An example of this can be found in the directive issues for the co-ordination of national procedures for the award of public works contracts.<sup>196</sup> This directive contains extremely detailed norms, by means of which the administrative activity of the State and other public entities for the award of such contracts is disciplined. They comprise direct norms to regulate the contents of the calls for tenders and their publications<sup>197</sup> and norms which establish the criteria in the award of the contract.<sup>198</sup> All the provisions centre on disciplining the exercise of powers by the administration and as such are therefore apt to create legitimate interests.

A case in point is *Angeloni c. Ministero poste*.<sup>199</sup> The ricorso centred upon the annulment, on the one hand, of the prefectorial decree (dated 26 novembre 1984) which permitted the immediate occupation of an area necessary for the construction of a local postal building not sited in the

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<sup>196</sup> EEC Dir 71/305.

<sup>197</sup> Note 196, arts 12 *et seq.*

<sup>198</sup> Note 196, art 29.

<sup>199</sup> TAR Marche 16 gennaio 1986: *Foro amm.* 1986, I, 2232.

provincial capital, together with the related orders; and, on the other, of all the acts during the proceedings *inter alia* (i) the local council deliberations concerning the location of the area and consequent variation of the level of construction; (ii) the awards allotting all the jobs concerned with the work in question; and (iii) the granting of a licence to the Italposte company for the carrying into effect of the same awards with the documental approval of the council.

The plaintiff maintained, *inter alia*, that the postal and telecommunications authority was not able to entrust the execution of the work involved, by means of private negotiation, to the Italposte company since such operation, although based on art 7 of *legge 10 febbraio 1982*,<sup>200</sup> would be illegitimate as against the Community norm concerning the prohibition of restrictions on the participation of foreign companies belonging to Member States or of according preference to national contractors in proceedings for the award of public works contracts.

The TAR Marche had to discover, therefore, whether the administrative judge had to disapply the national norm conflicting with that of the directive. The court observed that:<sup>201</sup>

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<sup>200</sup> n. 39.

<sup>201</sup> Note 199 at 2235: "It must be observed, in keeping with the prevailing doctrine that as far as it concerns the immediate applicability of the Community directives, where they are directed at all the Member States of the European Community and set general norms they should be considered, on the whole, as Regulations, as long as they deal with subject-matter which is disciplinable in some way as regulations, according to the instruction of the European Court of Justice for which the individuation of the kind of act issued by the Community organ does not depend on the *nomen* but in the first place by the object and content of the same act, and thus, as

Per quanto attiene, poi, all'immediata applicabilità delle direttive comunitarie va osservato, con la prevalente dottrina, che, ove le stesse - dettagliate - siano indirizzate a tutti gli Stati membri della Comunità europea e pongano norme di portata generale, esse debbano essere ritenute, nella sostanza, come regolamenti, sempreché trattino materie disciplinabili mediante quest'ultimi atti, secondo l'indirizzo della Corte di giustizia delle Comunità europee per la quale l'individuazione del tipo di atto emanato dall'organo comunitario non dipende dal *nomen* ma, in primo luogo, dall'oggetto e dal contenuto dell'atto medesimo, e perciò, come i regolamenti, debbono essere in tal caso ritenute immediatamente applicabili dal giudice interno.

The TAR Marche then considered that the directive, by dictating common norms of publicity and of participation in the competitions for tenders, through the enunciation of objective criteria of selection at the level of admission and of choice among the tenders, was accordingly assimilable to an EEC Regulation. As a consequence, the national judge had to disapply the law which, contrary to the Community principles, established the power of the postal and telegraphic authority to reserve public works in national programmes by means of concessions to Italpost.

Through this decision, the impugned prefectorial decree and all other acts consequent to that provision were annulled as being contrary to the provisions of the directive.

In conclusion, it may be stated that, on the one hand, acts of the Italian administration may be annulled on the grounds that they violate the provisions of an EEC Treaty Article, an EEC Regulation or even a directly applicable EEC Directive, *i.e.* a directive having substantially the same qualifications as an EEC Regulation. On the other hand,

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in the case of regulations, must be therefore considered immediately applicable by the internal judge."

however, the vast majority of directives have to be enacted into the Italian system either by a *legge*, *decreto legislativo* or ministerial decree. Failure to enact such measures means that Italian citizens cannot utilize directives directly before administrative courts as a ground for annulling a conflicting administrative act even if the time limit for enacting the national measures has already expired.<sup>202</sup> This result amounts to a failure by the Italian State to give equal and effective protection to rights of nationals deriving from EC norms. It is suggested that the attitude of the French administrative courts in their rapidly developing jurisprudence may be of assistance to their Italian counterparts in the resolution of the problem concerning the direct effect of directives.<sup>203</sup>

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<sup>202</sup> Contrary to the case law of the ECJ: see, e.g., Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1629.

<sup>203</sup> See *supra* at 207.

## CHAPTER FIVE

### CONCLUSIONS

#### (1) INTRODUCTION

It is intended that the conclusion will focus on the various remedies provided by the different domestic systems in a comparative context. Such remedies will then be measured against the standards set by the ECJ and the chapter will conclude with a discussion of future developments.

In order to achieve this, the chapter is divided into three parts.

The aim of the first part is to compare the use of national remedies to protect EC rights through the use of five situations, based on hypothetical facts, which tend to highlight the problems inherent in each legal system. The purpose of solving the problems arising from these hypothetical situations is to bring the debate on the availability and efficacy of national remedies in protecting EC rights down to a consideration of the practicalities involved, e.g. what procedures are to be used, the time within which actions must be commenced, etc. It must be pointed out, however, that the content of the hypothetical situations may tend to reflect English rather than civilian law concepts.

The second part seeks to measure the remedies provided by each domestic system against the standards set by the ECJ. Particular reference is made to the two distinct, though closely-related, principles of non-discrimination in the provision of a remedy and of effectiveness of the remedy itself in protecting EC rights. Compared to the requirements

expounded by the ECJ, all three domestic systems considered, in one form or another, fall below the minimum standards set.

Finally, the third part suggests the future development of the provision of remedies at the European level. Through measures aimed at harmonizing the practice and procedure of the Member States, individuals' rights may be more fully and effectively protected.

(2) HYPOTHETICAL SITUATIONS

(a) Problem One

Company A in Member State X imports a consignment of wheat from a non-Member State. At the border, it pays the necessary EC import levy at 150 Ecus per metric tonne on the assumption that the weight of goods is 40 metric tonnes. On arrival at its destination, the consignment is found to weigh only 38 metric tonnes.

Excess duty was paid as a result of this mistake of fact and A wishes to recover from the customs authorities in State X the excess so paid.

Under English Law, one of the kinds of mistake that will ground recovery is where money has been paid under a mistaken belief that there is a present liability.<sup>1</sup> In such circumstances, the burden is on A to show from the facts that it would not have made the payment but for its mistaken assumption of fact. Accordingly, A as the payer has to satisfy the court " ... that, on the balance of probabilities in all the circumstances of the case, it was a mistake of fact which gave rise to the overpayment."<sup>2</sup>

By restating the principle laid down by Parke B in *Kelly v. Solari*<sup>3</sup> and applying it to the present situation, it would seem to be correct to allow A's claim for restitution of the overpaid levy. Company A paid the levy on 40 tonnes to the customs authorities under the influence of a mistake, i.e. the

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<sup>1</sup> See *supra* at 61.

<sup>2</sup> *Avon CC v. Howlett* [1983] 1 WLR 605 at 620 per Slade LJ.

<sup>3</sup> (1841) 9 M & W 54; 152 ER 24.



supposition that the consignment weighed 40 tonnes: if A had known the actual weight it would not have paid the levy on the non-existent two tonnes.

On general principles, the action would therefore lie to recover the levy charged on the inexistent tonnage this being the specific fact to which A may indicate it was mistaken.

The area in question is, however, more directly regulated by the Customs & Excise Management Act 1979, s127<sup>4</sup> which permits the recovery of customs duties paid under a mistake of fact. Under that section, there is a limitation period of three months:<sup>5</sup> provided A makes its claim within that time, there would be no problems in claiming restitution of the excess levy.

In France, the principles stated in the Code civil, arts 1376 and 1377,<sup>6</sup> which establish the right to the reimbursement of money paid in error (*répétition de l'indu*),<sup>7</sup> are more closely regulated in the customs field by the Code des douanes.<sup>8</sup>

Company A would commence proceedings in the civil courts since they alone have jurisdiction to rule on individual disputes relating to the application of customs duties<sup>9</sup> and

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<sup>4</sup> See *supra* at 66.

<sup>5</sup> In such circumstances, the statutory provision creates a binding time-limit on the commencement of all actions, the subject-matter of which falls within the ambit of the Act.

<sup>6</sup> See *supra* at 147.

<sup>7</sup> CC arts 1376-1381: *supra* at 147.

<sup>8</sup> *Décr. 8 décembre 1948*, n° 48-1985: *supra* at 149.

<sup>9</sup> *Cordier*, Cass. 12 février 1968: J.C.P. 1969.II.15974, note L.S.C.

are bound to verify the legality of provisions issued by the customs authorities which seek to authorise the levying of such duties.<sup>10</sup> Indeed, under CD art 357 *bis*, the civil courts are given exclusive jurisdiction over restitution of duties.<sup>11</sup>

Before bringing the action, the necessary conditions precedent for founding a claim must be present.<sup>12</sup> In the instant case, they are present: the debt was inexistent at the time of payment since A was bound only to pay the levy on 38 and not 40 tonnes; and A paid the debt in error, it being irrelevant under French law that the error was one of fact or of law, provided it is excusable.

Accordingly, A has a right, based on the general principles of the Code civil (and more particularly on the customs law) to the reimbursement of the levy which it paid on the excess two tonnes with interest thereon.<sup>13</sup> Provided that A commences proceedings within the *délai* of three years prescribed by the Code des douanes,<sup>14</sup> its restitutionary claim would not meet with any particular difficulty.

In Italy, Company A would be equally well protected. There is a general principle of restitution of money paid which was not owed contained in the Codice civile art 2033 (*pagamento dell'indebito*).<sup>15</sup> A right to repayment of the

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<sup>10</sup> *Société Sogegis*, TC 12 novembre 1984, Rec 451.

<sup>11</sup> Provided that this does not involve criminal matters, in which the case the action falls within the jurisdiction of the criminal courts: see *supra* at 150.

<sup>12</sup> See *supra* at 148.

<sup>13</sup> *Société Rungis Porcs*, CA Douai 6 juin 1984: D.1984.543.

<sup>14</sup> See *supra* at 150.

<sup>15</sup> See *supra* at 232.

excess duty could be founded on art 2033 since the necessary preconditions for making a claim are present, *i.e.* there was a payment and this payment was made for an inexistent debt.<sup>16</sup> Such a claim would then be made within the ordinary ten-year limitation period.<sup>17</sup>

Although the field is more closely regulated by the 1982 customs law,<sup>18</sup> which provides A with an express right to repayment of the levy on the excess tonnage, if the application of the law would result in a failure to protect EC rights<sup>19</sup> then Italian civil courts (before which all claims for restitution of taxes must be brought)<sup>20</sup> would be bound to disapply the law and base the claim instead on the general principle contained in art 2033.<sup>21</sup>

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<sup>16</sup> See *supra* at 233.

<sup>17</sup> CC art 2946.

<sup>18</sup> L. 27 novembre 1982, n. 873, art 19: *supra* at 235.

<sup>19</sup> *i.e.*, documentary proof is too heavy a burden: *supra* at 239ff.

<sup>20</sup> See *supra* at 230.

<sup>21</sup> See *supra* at 233.

(b) Problem Two

Company B in Member State X imports a consignment of wheat from Member State Y. At the border, it pays a customs levy, enacted under a national provision and applicable to all imported grain. The ECJ subsequently declares the customs levy to be contrary to EEC Art 12 and to be of no effect.

The customs levy was paid as a result of a mistake of law and B wishes to recover from the customs authorities in State X the duty so paid. Consideration will also be had to the analogous situation in respect of an internal tax found to breach EEC Art 95.

Following English law as it stands, B's belief that the national provision (and the customs levy issued under it) was valid, when in fact it was contrary to EC law and of no effect, constitutes a mistake of law.<sup>22</sup> The levy which it has paid pursuant to that national provision is, on general principles, *prima facie* irrecoverable as having been paid under a mistake of law.<sup>23</sup> Moreover the payment appears to have been made voluntarily and there is no evidence of duress, compulsion or demand *colore officii*.<sup>24</sup>

In such a case, B could not recover the amount paid over. There are, however, other circumstances where recovery of money paid under a mistake of law has been allowed for special reason, e.g. a statutory exception to the general principle. One such exception is furnished by the Customs & Excise

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<sup>22</sup> See *supra* at 63-65.

<sup>23</sup> See *supra* at 63.

<sup>24</sup> See *supra* at 64.

Management Act 1979, s127 where there is provision for restitution of customs duties paid under a mistake of law, so long as the action is commenced within a three-month period.<sup>25</sup> This would therefore allow Company B to recover the excess duties being levied in contravention of the directly effective EEC Art 12.<sup>26</sup>

Problems arise, though, in respect of internal taxes which infringe EEC Art 95. Were the duties imposed to have breached that Article, no remedy would be available for B since the only statutory provision in this area - the Taxes Management Act 1970, s33<sup>27</sup> - refers only to mistakes of fact. In such a case, the denial of recovery of the illegally-levied tax would run counter to the case law of the ECJ<sup>28</sup> since such denial would amount to a failure to protect B's right under EC law.

For example, *Express Dairy Foods*<sup>29</sup> concerned an English firm seeking recovery of sums paid to a public authority under invalid EC law. The ECJ held<sup>30</sup> that while in the absence of Community rules such recovery was governed by national rules, those rules could not have the result of making impossible in practice the exercise of rights conferred by Community law - although the national authorities could take into account the

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<sup>25</sup> See *supra* at 66.

<sup>26</sup> See *supra* at 8.

<sup>27</sup> See *supra* at 67.

<sup>28</sup> See *supra* at 18.

<sup>29</sup> Case 130/79 *Express Dairy Foods v. Intervention Board for Agricultural Produce* [1980] ECR 1887.

<sup>30</sup> Note 29 at 1900.

fact that the relevant charges had been passed on to the claimant's customers.

It would therefore be impermissible for a public authority to plead mistake of law as a defence to a claim for restitution thereby rendering impossible the recovery of sums paid to that authority under national legislation subsequently declared to be incompatible with directly effective EC law provisions. Until this is accepted, though, companies like Company B remain exposed to losing many thousands of pounds through the denial of their legitimate rights under Community law.

Under French law, B's claim would be more closely based on the illegality of the national provision which imposed the levy and the particular provisions of the customs code.<sup>31</sup> Like Company A, it would commence proceedings in the civil courts unless it sought annulment of the French domestic provision on the ground that it conflicted with the relevant Treaty Article: in such case, an action would be brought before the administrative courts.<sup>32</sup>

In order to fulfil the necessary prerequisites for mounting a claim,<sup>33</sup> B need only prove that the debt was inexistent (which seems clear from the evidence). Doctrine and jurisprudence consider<sup>34</sup> that the *répétition de l'indu* is

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<sup>31</sup> See *supra* at 149.

<sup>32</sup> See *supra* at 150.

<sup>33</sup> See *supra* at 148.

<sup>34</sup> See Mazeaud, Mazeaud & Chabas, *Leçons de Droit Civil*, Vol II, at 785-786 (1985).

not subject to error on the part of B where the debt, which was the cause of the payment, was afterwards annulled.

Unlike the difficulties which companies in England encounter depending on whether the EEC Article infringed is a customs duty (EEC Arts 12-13) or a tax provision (EEC Art 95), French litigants do not face such problems.<sup>35</sup> The right to reimbursement of duties levied in contravention of EC law is guaranteed, whether the Article involved is EEC Art 95<sup>36</sup> or EEC Arts 12-13.<sup>37</sup> In the *Henri Ramel* case<sup>38</sup> it will be recalled that the court in question stated that the basis of the right to restitution was the direct effect of EEC Art 12 and not the abrogation of the irregular decree which gave rise to the right to reimbursement. Moreover, the court also affirmed that the company did not have to show any error on its part in paying the duty - the fact that it had paid such a duty to redeem its goods (later held to contravene EC law) was sufficient to found a claim for restitution. Company B will therefore be entitled to the restitution of the illegally-levied sum with interest thereon.<sup>39</sup>

In Italy,<sup>40</sup> Company B would *prima facie* be entitled to claim restitution on the basis of the 1982 customs law, art 19.<sup>41</sup> Provided that the conditions precedent for bringing the

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<sup>35</sup> See *supra* at 151ff.

<sup>36</sup> *Jacques Vabre*, Cass. 24 mai 1975: D.1975.497.

<sup>37</sup> *Henri Ramel*, CA Lyon 30 novembre 1978: D.1979.371.

<sup>38</sup> Note 37 *ibid*.

<sup>39</sup> *Société Rungis Porcs*, CA Douai 6 juin 1984: D.1984.543.

<sup>40</sup> See *supra* at 235.

<sup>41</sup> L. 27 novembre 1982, n. 873.

action are present,<sup>42</sup> primarily the payment of the inexistent debt, there should be little difficulty for Company B.

Any problems caused by the need for documentary evidence or proof of such payment, where this would prevent the claimant from recovering money paid over to fulfil any duty imposed by the Italian State in breach of EC law, would result in a disapplication of art 19 by the civil judge.<sup>43</sup> The basis of his decision would then exclusively be EC law - as this points back to national law, the basis of B's claim would then be the general norm which regulates the *condictio indebita*, viz. CC art 2033.<sup>44</sup>

Once the application of CC art 2033 is admitted in order to obtain reimbursement of taxes unlawfully demanded by the State, it is then necessary to admit, as a corollary, that the limitation period for commencing actions is the ordinary one for civil proceedings, viz. 10 years.<sup>45</sup>

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<sup>42</sup> See *supra* at 233.

<sup>43</sup> See *supra* at 239ff.

<sup>44</sup> Cass. 16 aprile 1986, n. 2711: *Giust. civ.* 1987, I, 630.

<sup>45</sup> CC art 2946.



(c) Problem Three

Company C is an exporter of pork and situated in Member State X. The Minister of Food in Member State Y, to which Company C exports much of its pork, imposes a ban at short notice on all pork imports. The government of State Y seeks to maintain the need for such a ban on the grounds of protection of public health but in fact its action follows fears expressed by pork producers in State Y as to the threat posed to their livelihood by such imports. The ECJ subsequently rules that the ban is in breach of EEC Art 30 and declares it to be of no effect.

Since Company C has suffered financial loss as a result of this illegal ban, it seeks (a) to have the ban annulled on the ground that it breached EC law; and (b) damages for the loss it has incurred due to the ban preventing it from exporting pork to State Y.

Under English law,<sup>46</sup> following the decision of the House of Lords in *O'Reilly v. Mackman*,<sup>47</sup> a litigant who seeks a remedy for an infringement of a right in public law *must*, as a general rule, proceed by the application for judicial review<sup>48</sup> and cannot simply issue a writ or an originating summons.<sup>49</sup> That decision therefore sought to ensure that the application for judicial review was to be used exclusively in public law

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<sup>46</sup> See *supra* at 120ff.

<sup>47</sup> [1983] 2 AC 237: for a full discussion see *supra* at 126.

<sup>48</sup> See *supra* at 120.

<sup>49</sup> See *supra* at 127-128.

cases. This approach<sup>50</sup> makes the distinction between "public" law and "private" law crucial, for it is only public law rights that *must* be vindicated through judicial review. It is thus vital to know whether one is dealing with a public law or a private law right.

The procedural consequences of the distinction are important. In particular, in an application for judicial review leave must be sought,<sup>51</sup> there is a very short (three-month) time limit<sup>52</sup> and, despite the availability of full interlocutory proceedings, the cases suggest that oral evidence will not generally be used<sup>53</sup> making it a less suitable form of proceeding for determining purely factual issues.<sup>54</sup>

Company C is therefore faced with a problem, *i.e.* should it proceed by writ or originating summons, or by application for judicial review. If it seeks to assert private law rights arising from breach of EEC Art 30 then the judicial review procedure, geared to granting discretionary relief, would be "wholly inappropriate"<sup>55</sup> and, it is submitted, that only if there has been no infringement of its private rights must Company C proceed by way of judicial review.

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<sup>50</sup> Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34 at 39.

<sup>51</sup> Supreme Court Act 1981, s31(3).

<sup>52</sup> Supreme Court Act 1981, s31(6).

<sup>53</sup> Rules of the Supreme Court Ord 53, r8.

<sup>54</sup> These are seen as the price to be paid for the very liberal rules of standing that apply (*IRC v. National Federation of Self-Employed* [1982] AC 617 at 644 *per* Lord Diplock) and speed of adjudication.

<sup>55</sup> *An Bord Bainne* [1984] 1 CMLR 519; [1984] 2 CMLR 584.

In the present case, there are two causes of action which could give rise to an action for damages under private law on the part of Company C against the Minister, viz.:

(i) Breach of statutory duty<sup>56</sup> along the lines envisaged by the House of Lords in *Garden Cottage Foods*.<sup>57</sup> Although the possibility of damages under this cause of action was denied to the company by the majority of the Court of Appeal in *Bourgoin*,<sup>58</sup> it is arguably still a ground on which to base a claim. It must be pointed out, though, that the question whether an action for breach of statutory duty will lie at the suit of an individual is dependent upon a number of factors, *inter alia*, whether the statute in issue was intended to give a cause of action, whether there is adequate compensation under existing tort law, whether the statute is for the benefit of a particular class and whether there is provision of a penalty for breach of the statute.<sup>59</sup>

(ii) Misfeasance in public office<sup>60</sup> since, even if the Minister's action was not malicious in the strict sense, from the given facts he imposed the ban with full knowledge of its invalidity *vis-à-vis* EC law. Damages for misfeasance are a possibility following the reasoning in the decisions of the High Court and Court of Appeal in *Bourgoin*.<sup>61</sup> There would be

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<sup>56</sup> See *supra* at 85ff.

<sup>57</sup> [1984] AC 130.

<sup>58</sup> [1986] QB 716.

<sup>59</sup> Craig, 'Compensation in Public Law' (1980) 96 LQR 413 at 423.

<sup>60</sup> See *supra* at 109ff.

<sup>61</sup> Note 58 *ibid*.

evidential problems, however, since this particular tort depends upon proof of a mental element, viz. malice, widely construed to connote spite or ill-will (narrow malice) and/or knowledge of the act.<sup>62</sup> In *Bourgoin*, the existence of the mental element was conceded by the Minister but this would not normally be the case.

Previously injunctions<sup>63</sup> were not available against the Minister<sup>64</sup> although they might have been available against any agency enforcing the ban like the Milk Marketing Board in the *Garden Cottage Foods* case.<sup>65</sup> This position was altered by a ruling from the ECJ in the *Factortame*<sup>66</sup> case, in which it ruled that interim measures were necessary to prevent breaches of EC law. Courts in the United Kingdom are now bound to grant interim injunctions to prevent breaches of EC law by the Crown and its ministers and permit the disapplication of a domestic provision which might effectively contravene EC law. Company C might therefore have sought, on the basis of the principles contained in *American Cyanamid*<sup>67</sup> and within an application for judicial review,<sup>68</sup> an interlocutory injunction to prevent the ban from having effect pending final determination by the courts.

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<sup>62</sup> Green & Barav, 'Damages in National Courts for breach of Community Law' (1986) 6 YEL 55 at 112.

<sup>63</sup> See *supra* at 69.

<sup>64</sup> Crown Proceedings Act 1947, s21.

<sup>65</sup> Note 57 *ibid*.

<sup>66</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>67</sup> [1975] AC 396: see *supra* at 71.

<sup>68</sup> See *supra* at 120.

Where C brings its action in private law seeking, in addition to damages, one of the prerogative orders e.g. certiorari to quash the ban, it would appear that a parallel application under RSC Ord 53 would be inevitable since the prerogative orders can only be granted following an application for judicial review. This view was taken in *Davy v. Spelthorne DC*.<sup>69</sup> There was a suggestion by Bush J in the Court of Appeal in that case<sup>70</sup> that if in fact the plaintiff, having initially brought a private law action, applied under RSC Ord 53 and obtained leave to proceed, then any claims in private law could be transferred to the Queen's Bench Division so that directions could be given for the most effective and cost effective method of trial.

Finally, if Company C begins proceedings by way of a public law action, such claims in tandem might not be necessary. Although the court has no power to determine issues of private law on an application under RSC Ord 53,<sup>71</sup> it does have the discretion under RSC Ord 53, r9(5) on hearing an application for judicial review to order that such proceeding should proceed as if they had begun by writ.<sup>72</sup> It is suggested that there is no reason why these powers should not be exercised in the context of a "mixed" claim.

Under French law, the protection afforded to C seems to be better established. The proceedings against the French

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<sup>69</sup> [1984] AC 262.

<sup>70</sup> (1983) 81 LGR 580 at 598.

<sup>71</sup> *An Bord Baine* [1984] 2 CMLR 584, per Donaldson MR.

<sup>72</sup> *An Bord Baine* [1984] 1 CMLR 519, per Neill J.

State would necessarily be brought before the administrative courts.

Providing that it has fulfilled the *conditions de recevabilité*,<sup>73</sup> C would be advised to use the *recours en pleine juridiction*<sup>74</sup> in its attempt to claim damages from the State - in that way, it can seek not only the annulment, modification or substitution of the administrative act (*i.e.* the ban) but also the award of pecuniary damages against the administration.

The next thing C needs to do, is to decide whether it seeks to claim damages on the basis of fault or non-fault liability.

If the company seeks to claim compensation on a no fault basis, it would have to show that the damage sustained had a certain<sup>75</sup> and direct<sup>76</sup> relationship with the administrative act which caused it and that the damage is *particularly* serious and special, *i.e.* it is limited to a particular person or small group of individuals.<sup>77</sup>

It will be recalled that in the *Alivar* case,<sup>78</sup> the company in question was prevented from exporting potatoes to

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<sup>73</sup> See *supra* at 157.

<sup>74</sup> See *supra* at 167.

<sup>75</sup> *Morlot*, CE 7 avril 1943, Rec 89.

<sup>76</sup> *Marais*, CE 14 octobre 1966, Rec 548.

<sup>77</sup> The Conseil d'Etat has already accepted, on the basis of non-fault liability, the responsibility of the State for loss resulting from the application of an international Treaty: CE 29 octobre 1976, Rec 452. Following its decision in *Alivar*, this has been extended to loss resulting from a non-application of the EEC Treaty.

<sup>78</sup> CE 23 mars 1984, Rec 127.

France due to the imposition of quotas and prior authorisations enacted by ministerial decrees.<sup>79</sup> Following a ruling by the ECJ,<sup>80</sup> France was declared to have breached EEC Art 34. The Conseil d'Etat was directly confronted with the question of determining what consequences an administrative judge was to draw from a decision of the ECJ declaring a failure by the French State to fulfil its EC obligations. In its judgment, the Conseil recognised, *inter alia*, the responsibility of the French State on the basis of a non-fault liability régime which would alone be sufficient to support the claim and not because of the existence of a violation of a directly effective Treaty provision, EEC Art 34. In fact it regarded such a violation as neither unlawful nor wrongful in domestic law and was careful to avoid accepting the illegality of the national administrative measure, as declared by the ECJ.<sup>81</sup>

Applying the principles of *Alivar* to the present case, it is clear that Company C would be able to be compensated for the loss suffered on a non-fault liability basis without there being a need for the administrative court to determine the illegality of ban on the basis of the ECJ's decision.

However, one of the reasons for using non-fault liability as a basis for state liability within EC law was to circumvent the Conseil d'Etat's refusal to pronounce on the lawfulness of

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<sup>79</sup> See *supra* at 175.

<sup>80</sup> Case 68/76 *Commission v. France* [1977] ECR 515.

<sup>81</sup> See also *Société Tresch-Alsacaves*, TA Strasbourg 5 juin 1984: [1986] 2 CMLR 62: see *supra* at 184.

domestic measures which amount to a failure by the French State to fulfil its EC obligations, *i.e.* breach EC law.

Since the decision in the *Nicolo* case,<sup>82</sup> the administrative courts may no longer feel bound not to pronounce on the legality of national provision. In such circumstances, fault liability of the State may also be usefully considered.<sup>83</sup>

A case in point is that of *Steinhauser*,<sup>84</sup> in which the claimant, a German national, sought to participate in the tendering procedure for the allocation of public property belonging to a municipality. When this was refused on the ground that the conditions of tender specifically permitted only French nationals to participate, the claimant brought a *recours en pleine juridiction*<sup>85</sup> seeking annulment of the refusal and damages for the loss sustained by him as a result of the refusal.

On a reference to the ECJ, the court stated<sup>86</sup> that EEC Art 52 precluded the requirement of nationality being imposed as a precondition for the taking part in the tendering procedure. In drawing the necessary consequences from this preliminary ruling, the Tribunal administratif de Pau<sup>87</sup> annulled both the tendering procedure and the contracts

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<sup>82</sup> CE 20 octobre 1989, Rec 190.

<sup>83</sup> See *supra* at 169.

<sup>84</sup> TA Pau 12 novembre 1985, Rec 154.

<sup>85</sup> See *supra* at 167.

<sup>86</sup> Case 197/84 *Steinhauser v. City of Biarritz* [1985] ECR 1819 at 1827.

<sup>87</sup> See *supra* at 187.



entered pursuant to it. The illegal refusal constituted a wrongful act (*faute*) which gave rise to the liability of the city and ordered that the claimant's professional damage, i.e. loss of additional income he could have earned had he been allocated the necessary public property, should be compensated.

In *Steinhauser*, therefore, the national judge found that a simple violation of the Treaty provisions, interpreted by the ECJ, had been committed by the public authorities and, on this ground, ordered the authorities to make good the loss suffered as a result of their unlawful action.

Under Italian law, Company C faces the problem of having to commence proceedings in the administrative courts to seek annulment of the national measure within 60 days.<sup>88</sup> Then, if successful, it will have to bring an action in the civil courts to seek compensation for damage resulting from such a measure within the five-year limitation period provided by the *Codice civile*.<sup>89</sup>

Given that C has satisfied the *condizione di ricevità*,<sup>90</sup> it would be advised to bring its action within the *ricorso di legittimità*<sup>91</sup> since presumably C would only wish to annul the domestic act. Such act is annulable and continues to have effect until a decision annulling it is made. Whenever the *vizio* is capable of violating a Community norm, annulment can

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<sup>88</sup> See *supra* at 275.

<sup>89</sup> See *supra* at 244. The five-year limitation period for bringing an action for damages, based on CC art 2043, is to be found in CC art 2947.

<sup>90</sup> See *supra* at 268.

<sup>91</sup> See *supra* at 277.

be attempted on the ground of *violazione di legge*.<sup>92</sup> This occurred in the *Colussi* case<sup>93</sup> where the Consiglio di Stato quashed import restrictions (based upon certain circulars, ministerial decrees and domestic regulations) on the ground that it contravened EEC Art 31 and was therefore unlawful.

From this decision, it would seem certain that C is entitled to the annulment of the domestic administrative act (*i.e.* the ban) in the present case on the ground of *violazione di legge*.

Even if the act were to be quashed, C would not be guaranteed to receive compensation for the loss suffered as a result of the operation of the act.

Previous jurisprudence had tended to suggest that the civil courts would allow a litigant to claim damages resulting from an illegal administrative act, without the necessity of an enquiry into the subjective element of malice or fault on the part of the administration.<sup>94</sup> If such were the case, C would *prima facie* be entitled to damages as was held in the *Colussi* case.<sup>95</sup> In reaching its decision in that case, the Corte di Cassazione considered *inter alia* that an illicit deed could be imputed to the Ministry since Colussi had found it practically impossible to import goods from abroad and present them to the customs authorities. The court accordingly held that the freedom to import goods from another Member State constituted a subjective right based on a combination of the

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<sup>92</sup> See *supra* at 288.

<sup>93</sup> Cass. 4 agosto 1977 n. 3458: *Giust. civ.* 1978, I, 135.

<sup>94</sup> Cass. 19 aprile 1956, n. 1177: *Giust. civ.* 1956, I, 1554.

<sup>95</sup> Cass. 4 agosto 1977, n. 3458: *Giust. civ.* 1978, I, 135.

directly effective EEC Art 31 and the Italian Constitution art 41.

A more recent decision of the Corte di Cassazione has stated,<sup>96</sup> however, that in order for the court to be able to affirm the administration's responsibility according to CC art 2043 (and therefore the right of the injured party to compensation), it was necessary for the injured party to prove that the act had been issued with *dolo*<sup>97</sup> or with *colpo*.<sup>98</sup> In the present case, it could well be argued that the Minister had acted with *dolo*, the conscious will to commit the illicit act, since he sought to protect the national pork producers - something which is impermissible as a reason for banning imports under the EEC Treaty. Such act infringed the subjective right of C which is therefore entitled to compensation for any loss suffered.

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<sup>96</sup> Cass. 29 giugno 1981, n. 4204: *Giust. civ.* 1981, I, 1893.

<sup>97</sup> See *supra* at 245.

<sup>98</sup> See *supra* at 245.

(d) Problem Four

D is a national of Member State X. While working at a university in Member State Y, she takes a prominent role in political demonstrations organised by the students and is consequently served with a deportation order issued by the Minister of the Interior for State Y.

D seeks to challenge the order on the ground that it was issued in violation of EEC Art 48 and, more specifically, EEC Dir 64/221, art 6 since no reasons for the order were given.

The free movement of persons is guaranteed by EEC Art 48. By way of EEC Arts 48(3) and 56, however, Member States retain certain reserve powers relating to public policy, public security and public health which may be employed to limit freedom of movement for persons. More particularly, EEC Dir 64/221 is intended to secure "the co-ordination of special measures concerning the movement of foreign nationals on grounds of public policy, public security and public health." It applies across the board, to all measures affecting entry into a Member State, issue and renewal of residence permits and expulsion, and whether the EEC national is employed or self-employed. Additionally, the ECJ has affirmed that the power to derogate from the fundamental principle of free movement is exceptional and must be interpreted restrictively.<sup>99</sup>

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<sup>99</sup> Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case 2/74 *Reyners v. Belgian State* [1974] ECR 631; Case 67/74 *Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297; Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219.

It is to be noted that EEC Art 48 was declared to be of direct effect in *Van Duyn*<sup>100</sup> and EEC Dir 64/221 in *Rutili*.<sup>101</sup> Article 6 of the Directive requires a Member State to inform a person, in respect of whom the public policy proviso is being invoked, of the grounds of public policy, public security or public health on the basis of which this was being done.

Under English law, it would be appropriate for D to apply for judicial review<sup>102</sup> since the Minister's action in making the order has taken place in the public law sphere. D would necessarily apply under RSC Ord 53 within the three-month limitation period. The direct effect of EEC Art 48 and more particularly art 6 of EEC Dir 64/221 would form the basis of D's claim that the Minister's failure to give any reasons was in breach of EC law. If the EC provisions are viewed as giving rise to a statutory duty to give reasons, failure to observe it could lead a court to require the Minister to give them by a mandamus.<sup>103</sup> Failure to give adequate reasons may amount to an error of law so as to justify the quashing of the decision by certiorai.<sup>104</sup> However, it is more likely that D would seek the quashing of the decision on the ground that the Minister failed to comply with a mandatory procedural requirement, i.e. he failed to give reasons: there has been

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<sup>100</sup> Note 99 *ibid*.

<sup>101</sup> Note 99 *ibid*.

<sup>102</sup> See *supra* at 120.

<sup>103</sup> *Earl Iveagh v. Housing & Local Govt Minister* [1962] 2 QB 147.

<sup>104</sup> *Alexander Machinery (Dudley) Ltd v. Crabtree* [1974] ICR 120.

a complete failure to comply with a requirement which is regarded as an important procedural safeguard for the individual, with the result that D has been prejudicially affected.<sup>105</sup>

In France, D would be obliged to bring proceedings in the administrative courts. First, she could seek interim relief in the form of an order of *sursis*<sup>106</sup> to suspend the deportation order. It would seem to be clear that she fulfils the criteria for seeking the order, viz. that (a) there is a risk of "irreparable damage" if the *sursis* were not to be granted, i.e. the loss of her job and her being unable to return to France; and (b) she has a serious chance of success in her main application, i.e. the probable annulment of the deportation order on the ground that it breached EC law.

She could then try to obtain the annulment of the deportation order. D would be advised to bring a *recours pour excès de pouvoir*<sup>107</sup> on the probable basis of *violation de la loi*, i.e. the administrative act violates some statute or international treaty. It could be argued that since the *Nicolo* case,<sup>108</sup> the administrative courts may be more willing to rule on the compatibility of domestic measures with EEC Treaty provisions. It could therefore seek to have the order annulled on the ground that it was issued in contravention of EEC Art 48.

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<sup>105</sup> See Jones, *Administrative Law* 7th ed. at 166-169 (1989) and the cases cited.

<sup>106</sup> See *supra* at 163.

<sup>107</sup> See *supra* at 189.

<sup>108</sup> CE 20 octobre 1989, Rec 190.

However, the field is more closely regulated by EEC Dir 64/221, art 6. In this respect the problem for D before the French administrative courts is their refusal to recognise judgments of the ECJ declaring provisions of directives to be of direct effect.<sup>109</sup> Although there was much criticism of the Conseil d'Etat's decision in the *Cohn-Bendit* case,<sup>110</sup> where it refused to give internal effect to art 6 of EEC Dir 64/221, the Conseil indicated that several procedures were left open to the individual for obtaining the application of EEC Directives, viz:

- (a) nationals could contest the *mesures réglementaires* issued to implement a directive, in regard to the provisions of that directive;<sup>111</sup>
- (b) nationals could oppose, by use of all national legal routes, the application of a rule of domestic law contrary to the objectives of a directive;<sup>112</sup>
- (c) nationals could seek the abrogation of national measures on the basis of changes provoked by a directive in the factual or legal context of these measures.<sup>113</sup>

In the present case, it is to the second option to which D could turn in order to seek annulment of the order, i.e. to censure a measure issued in violation of the objectives of EEC Dir 64/221. In the *Fédération Française* case,<sup>114</sup> it will be

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<sup>109</sup> See generally *supra* at 198ff.

<sup>110</sup> CE 22 décembre 1978, Rec 524.

<sup>111</sup> See *supra* at 208.

<sup>112</sup> See *supra* at 212.

<sup>113</sup> See *supra* at 214.

<sup>114</sup> CE 7 décembre 1984, Rec 410.

recalled, the applicant company maintained that certain ministerial orders could be annulled on the ground that they were contrary to the provisions of EEC Dir 79/409. The Commissaire du gouvernement Dutheillet de Lamothe said<sup>115</sup> that national authorities were bound *a fortiori* not to adopt domestic measures directly contrary to the objectives of a directive.

When making the deportation order, the French State had failed to comply with art 6. In so doing, the order had been issued *en méconnaissance* of the objectives defined by the directive, *viz.* the duty to inform the individual of the grounds of public policy, public security or public health upon which the order had been made. D was consequently entitled to the revocation of the deportation order on the grounds that it was contrary to EC law.

Under Italian law, it is apparent that D would seek to annul the deportation order in the administrative courts through the *ricorso di legittimità*<sup>116</sup> on the ground either of *violazione di legge*<sup>117</sup> because the order was capable of violating an EC norm (either EEC Art 48 or the directive) or of *eccesso di potere*<sup>118</sup> since the making of the deportation order concerned the exercise of administrative discretion.

The main difficulty concerns the EEC directive. On the basis that it had been enacted into Italian law, D would be able to use the terms of the Italian implementing law to have

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<sup>115</sup> R.F.D.A. 1985.303 at 305.

<sup>116</sup> See *supra* at 277.

<sup>117</sup> See *supra* at 288.

<sup>118</sup> See *supra* at 284.



the act annulled.<sup>119</sup> Where, however, there is no such law, the directive may not be directly invoked to protect nationals before the Italian courts.<sup>120</sup> Reference would then need to be made to EEC Art 48. Since this has been declared to be of direct effect, D could base her claim for annulment of the order on the ground that it amounted to *violazione di legge* as was successfully done in *Colussi*<sup>121</sup> with respect to EEC Art 31.

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<sup>119</sup> See *supra* at 289ff.

<sup>120</sup> *Isabella*, Cons. Stato 21 giugno 1968: *Dir. scambi internaz.* 1968.529 and generally *supra* at 292ff.

<sup>121</sup> Cass. 4 agosto 1977, n. 3458: *Giust. civ.* 1977, I, 135.

(e) Problem Five

A law provides that no person shall carry on investment business or give investment advice in Member State X without holding a certificate issued for that purpose by a Board established by the law. The law provides that certificates shall be granted if the applicant has been "ordinarily resident in State X for three years."

E, a qualified investment broker, with many years' experience in State Y of which he is a national and a resident, applies for a certificate but it is refused on the grounds of his not having been resident in State X for the requisite time.

E therefore seeks to overturn the refusal to grant him a certificate because the ground on which it was based was in breach of EC law.

In *Van Binsbergen*,<sup>122</sup> the ECJ declared that the EEC Treaty provisions which guaranteed freedom to provide services, EEC Arts 59(1) and 60(3), were of direct effect. Such provisions could therefore be relied upon before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided.

Applying this to the case under English law, E would be advised to apply for judicial review<sup>123</sup> under RSC Ord 53 to seek (i) an order for certiorari to quash the decision of the

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<sup>122</sup> Case 33/74 [1974] ECR 1299.

<sup>123</sup> See *supra* at 120.

body; and (ii) an order for mandamus requiring the regulatory body to exercise its statutory powers and issue the certificate, on the ground that the residence requirements are not applicable to EC nationals since they prevent the right to provide services.

Where the problem arises under French law, it may be assumed for the purposes of this conclusion that the investment board is a specialist jurisdiction<sup>124</sup> like the supreme disciplinary organs of the medical profession or of accountants or a statutory body like the *Commission de contrôle des banques* which supervises banking law and practice.

In such case, E must bring a *recours en cassation*<sup>125</sup> to annul the decision emanating from the board. The *recours* only permits the Conseil d'Etat to quash the decision for procedural error or illegality and then to refer the case back to the board for a new adjudication. It would seem that if there has been an alleged breach of EC law, the ground for review would be *violation de la loi*.<sup>126</sup>

As regards the residence requirement in the field of investment services, reference must naturally be had to the EEC Treaty provisions. Now that the Conseil d'Etat in *Nicolo*<sup>127</sup> has accepted the supremacy of Treaty provisions over inconsistent national legislation, E would have a good case to argue that the residence requirement infringes his

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<sup>124</sup> See *supra* at 190.

<sup>125</sup> See *supra* at 190.

<sup>126</sup> See *supra* at 194.

<sup>127</sup> CE 20 octobre 1989, Rec 190.

right under EEC Arts 59(1) and 60(3) and were discriminatory largely on grounds of nationality.

The Conseil d'Etat would accordingly quash the board's decision and remit the case to it for further determination in the light of that decision.

In the case of Italy, E could bring his action before the administrative courts either by the *ricorso di legittimità*<sup>128</sup> to annul the board's decision or even by the *ricorso in merito*<sup>129</sup> where he could not only seek its amendment but also its partial or total revision, i.e. the courts could revise the decision so that the certificate is thereby issued to him without a further application to the board.

E, as before the English and French courts, would plead that the direct effect of EEC Arts 59(1) and 60(3) had been breached by the effect of the board's refusal to issue a certificate. Since the EEC Treaty was to apply in such circumstances, the relevant domestic provisions were inapplicable - the board's refusal could be seen as a *violazione di legge*<sup>130</sup>, i.e. of EEC Arts 59(1) and 60(3), and would therefore form the grounds for its amendment or annulment.

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<sup>128</sup> See *supra* at 277.

<sup>129</sup> See *supra* at 280.

<sup>130</sup> See *supra* at 288.

(3) COMPARISON OF REMEDIES TO STANDARDS OF THE EUROPEAN COURT

This comparative analysis of the current situation in the availability of remedies against the administration for breach of directly effective EC provision has highlighted, through the hypothetical situations, the various weaknesses in national legal systems in protecting individuals' EC rights.

As has been previously stated,<sup>131</sup> where rights are conferred upon individuals by directly effective Community provisions, it follows from the combined effect of the doctrines of direct effect and supremacy of EC law that national courts are bound to protect and enforce those rights against any adverse measure or practice of the Member States which tends to prevent their free exercise. The national courts are obliged to afford direct and immediate protection.<sup>132</sup> However, in the absence at the present time of any relevant Community provisions, the rights conferred upon individuals must be exercised before national courts in accordance with the system of remedies and procedures available under domestic law.<sup>133</sup> Community law requires no more than that adequate protection be afforded; it leaves to each Member State the task of laying down, *inter alia*, the rules of procedure and time limits for that purpose.

This principle is, however, subject to two highly important provisos:

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<sup>131</sup> See *supra* at 4ff.

<sup>132</sup> See *supra* at 14.

<sup>133</sup> Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043; Case 33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

(i) the national rules of procedure must not make it impossible in practice to exercise rights which the national courts have a duty to protect":<sup>134</sup> the principle of effectiveness.

(ii) the national rules of procedure governing action for the enforcement of EC rights may not be "less favourable than those governing the same right of action in an internal matter":<sup>135</sup> the principle of non-discrimination.

It is to be noted that the two provisos operate independently of one another so that -<sup>136</sup>

... the requirement of non-discrimination laid down by the Court cannot be construed as justifying legislative measures intended to render any repayment of charges levied contrary to Community law virtually impossible, even if the same treatment is extended to taxpayers who have similar claims arising from an infringement of national tax law.

Subsequent cases have shown<sup>137</sup> that these principles apply not only to rules of procedure but also to the availability of remedies and rights of action.

The principle of effectiveness was recently reaffirmed by the ECJ in the *Factortame* case.<sup>138</sup> Having cited its own judgment in *Simmenthal*,<sup>139</sup> the ECJ reiterated<sup>140</sup> that it was

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<sup>134</sup> Note 133 at 2053; *ibid.* at 1998.

<sup>135</sup> Note 133 at 2053; *ibid.* at 1998.

<sup>136</sup> Case 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595.

<sup>137</sup> See cases discussed by Oliver, 'Enforcing Community Rights in the English Courts' (1987) 50 MLR at 883-891.

<sup>138</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>139</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

<sup>140</sup> Note 138 *ibid.*

for the national courts, in application of the principle of co-operation laid down in EEC Art 5, to ensure the legal protection which persons derived from the direct effect of the provisions of EC law. Further, any national provision or practice - whether legislative, administrative or judicial - which might impair the effectiveness of EC law by withholding from the national court having jurisdiction to apply such law, the power to do everything necessary at the moment of its application to set aside national provisions which might prevent EC rules from having full force and effect were incompatible with those requirements, which were the very essence of Community law.<sup>141</sup>

The principles of effectiveness and non-discrimination, however, are limited in their application to provisions of direct effect.<sup>142</sup>

By using these principles, it is possible to assess the measure of protection afforded to individuals before the English, French and Italian courts against the supranational standard set by the ECJ. It is submitted that all three national jurisdictions, on the whole, comply with the principle of non-discrimination. Individuals commencing proceedings to enforce rights deriving from EC law in these jurisdictions are not treated any less favourably than their counterparts seeking to protect similar rights arising under domestic law. This principle is of great assistance in

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<sup>141</sup> Note 138 *ibid*.

<sup>142</sup> Case 152/79 *Lee v. Minister for Agriculture* [1980] ECR 1495.

requiring the acceptance by the various domestic legal systems of EC law on the same footing as national law.

It is when the principle of effectiveness is considered, however, that the Member States' remedies fail to attain the requisite standard demanded by the ECJ.

Unlike the provisions for *condictio indebiti* in the French and Italian civil codes, English law does not have a fundamental principle of restitution covering payments made in mistake both of law and of fact. Customs duties levied by the English customs authorities in contravention of EEC Arts 12 and 13 may be restituted in accordance with the Customs and Excise Management 1979, s127 where any internal tax is levied in contravention of EEC Art 95, though it may only be restituted under the Taxes Management Act 1970, s33 if there has been a payment made on the basis of a mistake of fact. Where the payment was made under a mistake of law, the tax may not be restituted. There are no statutory provisions as yet<sup>143</sup> which alter the common law principle that money may not be reimbursed if it was paid over on the basis of a mistake of law. This may amount to non-discrimination in the treatment of the claimant deriving his rights from EC law but it renders any protection of such a right as ineffective.

In the area of damages, the majority in *Bourgoin*<sup>144</sup> took the view that judicial review and not damages for breach of statutory duty would be an adequate remedy for breach of EEC Art 30, although they failed to address the former problem of

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<sup>143</sup> Though the Lord Chancellor has requested the Law Commission to reconsider the common law principles on restitution.

<sup>144</sup> [1986] QB 716.



the absence of interim relief against the Crown. Underlying the majority's thinking is the idea, clearly expressed by Nourse LJ in the following terms:<sup>145</sup>

The remedies and procedures which are available in England for the protection and enforcement of a right to require a minister of the Crown to continue a licence which he is under a duty not to revoke are those which are available in proceedings for judicial review. They are regarded by English law as providing an effective protection for the right. It is suggested that that view is not shared by Community law, but I have been unable to see why that should be so. It is, as it seems to me, a suggestion which does less than justice to the wisdom of those who have shaped the jurisprudence of the European Court. They have recognised that remedies and procedures are best left to the law which is familiar to the country in which the right must be enforced.

As has been noted, this statement amounts to saying that the remedies actually available in English law must be deemed to be effective - which begs the very question to be decided. If a plaintiff were not able to obtain either interim relief against the Crown or damages for the period prior to final judgment, the remedies relating to that period could surely not be regarded as truly effective. While judicial review provides adequate final remedies, it gives no relief with respect to the period prior to judgment.

At the present time, an individual does not have a right under English law to claim damages for loss sustained as a result of the application of an Act of Parliament, e.g. in breach of EC law. According to the majority in *Bourgoin*,<sup>146</sup> however, damages were recoverable in respect of legislative or

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<sup>145</sup> Note 144 at 789-790.

<sup>146</sup> See *supra* at 113.

quasi-legislative acts in the case of misfeasance in a public office.<sup>147</sup>

If the litigant can overcome the evidential burden of proof of a mental element, *i.e.* that the public official acted with malice or knowledge of the *ultra vires* nature of the challenged act, then damages may be successfully claimed.<sup>148</sup> As a corollary, though, where the breach of *e.g.* the EEC Treaty Article by such an official is committed reasonably and in good faith, damages for misfeasance are not recoverable and it is debatable<sup>149</sup> whether this would infringe the principle of effectiveness.

Following the decision of the ECJ in *Factortame*<sup>150</sup> and in the absence of an effective remedy in damages, interim injunctive relief is now available against the Crown and its officers in proceedings for the enforcement of EC law despite the provisions of the Crown Proceedings Act 1947, s21. But if the courts find that they may now grant interim injunctions to plaintiffs relying on Community law rights,<sup>151</sup> they will probably be loth in practice to do so. If this were to happen, then the principle of effectiveness would surely not be satisfied.

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<sup>147</sup> See *supra* at 115.

<sup>148</sup> See *supra* at 109ff.

<sup>149</sup> Oliver, *loc. cit.* at 906.

<sup>150</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>151</sup> It seemed clear that in any case interim declarations would not be available. *IRC v. Rossminster Ltd* [1980] AC 952. But following *Factortame*, see Barav, 'Interim relief and English courts' (1990) 140 New LJ 896.

Under French law, the litigant appears to be much better protected. The restitution of customs duties is regulated by statute based on the underlying concept of *répétition de l'indu*;<sup>152</sup> annulment or variation of administrative acts contrary to EC law is possible;<sup>153</sup> and, finally, damages are recoverable against the administration for breach of EC law, such remedy being available in the same procedure as annulment of the contravening domestic measure.<sup>154</sup> Everything therefore seems to point to the conclusions that there is effective protection of EC rights in French courts.

Despite this apparent compliance with the standard set by the ECJ, the protection afforded by French administrative courts in certain areas may be considered to be deficient; for example, the area of liability for administrative acts contravening EC law as was considered in *Alivar*.<sup>155</sup> In that case, the tribunal administratif declared - pursuant to and in the light of the ECJ judgment under EEC Art 169 - that a wrongful act (*faute*) had been committed by the defendant ministry and awarded damages to the company at this basis.

On appeal, however, the Conseil d'Etat in effect held that national legislation, the inconsistency of which with a directly effective Community law had been established by a judgment of the ECJ under EEC Art 169, was not to be regarded as unlawful in domestic law within the framework of proceedings for compensation - at least in cases where the

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<sup>152</sup> See *supra* at 147.

<sup>153</sup> See *supra* at 196.

<sup>154</sup> See *supra* at 175.

<sup>155</sup> CE 23 mars 1984, Rec 127.

legislation was justified by the public interest; nor should it be regarded as wrongful for the purpose of such proceedings.

It was only because of the recognition in French law of a system of non-fault administrative liability which enabled the Conseil d'Etat to order that the Alivar company be compensated for the loss suffered as a result of the application of the national legislation concerned.<sup>156</sup> Although the company would seem to have been effectively protected in this case, it is submitted that it is inconceivable that domestic courts should be permitted to regard a national measure, found by the ECJ to infringe Community law, as legitimate in the national legal order.

A further problem arises in the context of EEC directives. In several cases<sup>157</sup> the ECJ has affirmed that certain provisions of directives are self-executing or "have direct effect," entitling individuals to invoke them in national litigation.

The question then arises whether these pronouncements on the direct effect of such provisions by the ECJ are binding on national courts. The EEC Treaty does not explicitly bind Member States and their authorities to observe every ruling of the ECJ.<sup>158</sup> It is clear that in the view of the ECJ itself,

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<sup>156</sup> See *supra* at 175ff.

<sup>157</sup> Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case 2/74 *Reyners v. Belgian State* [1974] ECR 631; Case 67/74 *Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297; Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219.

<sup>158</sup> EEC Art 177 is silent on the consequences of a preliminary ruling, though it is arguable that such an obligation is implicit in EEC Art 5.

a preliminary ruling is binding on the national court making the reference.<sup>159</sup>

The French *civil* courts appear to have cast no doubt on the binding force of the ECJ's rulings. For instance, the obligatory nature of the ECJ's rulings was expressly recognised in the *Raffaele* case<sup>160</sup> where the court stated that decisions of the ECJ rendered for interpretation were of a general nature because they were designed to unify the jurisprudence of the courts of Member States; they were therefore binding on these courts.<sup>161</sup>

However, as was seen in *Cohn-Bendit*,<sup>162</sup> the French *administrative* courts are not prepared to accept the direct effectiveness of directives recognised as such by the ECJ. In this respect they differ from the English courts which are strictly bound, by the express wording of the UK European Communities Act 1972, s3(1), to determine questions of EC law "in accordance with the principles laid down by and any relevant decision of the European Court of Justice" unless they refer the question afresh to that court.

Since one of the corollaries of the ECJ declaring a provision of EC law to be of direct effect is the adequate protection by the national courts of an individual's right

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<sup>159</sup> Case 29/68 *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken* [1969] ECR 165 at 180. Some authors maintain this is a matter for the discretion of national courts, see e.g. Schermers, *Judicial Protection in the European Communities* 2nd ed. para. 619 at 354-355 (1979).

<sup>160</sup> CA Paris 13 novembre 1970: Gaz. Pal. 1971.206.

<sup>161</sup> This pronouncement points out clearly that such is the teleological interpretation given by French courts to EEC Arts 164 and 177.

<sup>162</sup> CE 22 décembre 1978, Rec 524: see generally *supra* at 198ff.

deriving from such a provision, the French administrative courts fail to offer any protection whatsoever to these rights.

On the one hand, it is possible to admit<sup>163</sup> that the interpretation by the Conseil d'Etat in *Cohn-Bendit*<sup>164</sup> of EEC Arts 56 and 189, taken in isolation, corresponds more closely to their literal meaning. On the other hand, the ECJ's interpretations are more in harmony with the aims of the relevant chapters of the EEC Treaty. Yet the whole of the Treaty was accepted by France in 1957. In *Cohn-Bendit*, by implicitly challenging the authority of the ECJ's pronouncements, the Conseil d'Etat<sup>165</sup> set a very regrettable precedent.

In present circumstances, therefore, the administrative courts do not offer effective protection to rights deriving from directly effective EC provisions. The consequent failure of the administrative courts to comply with the obligation for Community loyalty under EEC Art 5 undermines the overall position the ECJ has sought to create by using the principle of direct effect as a means of guaranteeing greater direct protection to rights of EC nationals.

The attitude of the Italian courts, whether civil or administrative, in the face of EEC directives has been the same, *i.e.* the refusal to accept the possibility of direct effect of certain provisions. Like the French administrative

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<sup>163</sup> See Simon & Dowrick, 'Effect of EEC Directives in France: The Views of the Conseil d'Etat' (1979) 95 LQR 376 at 384.

<sup>164</sup> Note 162 *ibid.*

<sup>165</sup> Note 163 at 385: the decision of the Conseil was made against the advice of its own Commissaire du gouvernement.

courts, the Italian courts base their position on a strict interpretation of EEC Art 189 thereby denying any effect to directives within their system unless the directives form part of that system directly since they are akin to EEC Regulations<sup>166</sup> or indirectly as they have been implemented by means of national (usually legislative or administrative) measures.<sup>167</sup> This clearly amounts, as in the case of the French administrative system, to a denial of the effective protection of EC rights and a failure on their part to comply with the requirement of Community loyalty enshrined in EEC Art 5. Until the Italian courts are prepared to accept that directly effective provisions of directives may be invoked in actions involving EC law, their nationals and EC claimants in their courts will be in a less advantageous position than litigants bringing proceedings before English courts.<sup>168</sup>

In other circumstances, the protection of individuals before Italian courts has been rendered ineffective. Following the decision of the ECJ in *Hans Just*,<sup>169</sup> in which it was held that a tax or charge unlawfully levied by the administration could not be recovered by a trader who had passed on this charge to his clients in increased prices, Italy saw the ruling as an opportunity to incorporate this concept into its own law in such a way as to frustrate actions

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<sup>166</sup> See *supra* at 299.

<sup>167</sup> See *supra* at 292.

<sup>168</sup> This problem may be resolved following the decision of the Corte costituzionale 11 luglio 1989, n. 389: *Riv. dir. internaz.* 1989, 404. For a discussion of the case, see *supra* at 228.

<sup>169</sup> Case 68/79 *Hans Just v. Ministry for Fiscal Affairs* [1980] ECR 501.

for the recovery of charges imposed contrary to EC law. Legislation<sup>170</sup> was enacted providing that a plaintiff could only recover sums if he could discharge the burden of showing that he had not passed them on. Furthermore, the legislation purported to be retroactive and, if that were not enough, the provisions<sup>171</sup> stipulated that only documentary evidence could be relied on.

In *San Giorgio*<sup>172</sup> an Italian court requested the ECJ to rule whether such provisions were compatible with Community law. The ECJ replied that they were contrary to the principle of effectiveness. Although there was little or no general guidance as to what presumptions and rules of evidence were permissible, there could be little doubt that, even without the stipulation that only documentary evidence could be furnished, the measures would have fallen foul of the principle of effectiveness.<sup>173</sup>

In such circumstances, the Italian Corte di Cassazione later ruled in, e.g. *ESSEVI*,<sup>174</sup> the Italian courts were bound to disapply the national measures and instead revert to the general principle of *condictio indebiti* enshrined in Italian law by the Codice civile, art 2033.

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<sup>170</sup> See *supra* at 235: L. 27 novembre 1982, n. 873.

<sup>171</sup> Note 170 *ibid.*, art 19.

<sup>172</sup> Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>173</sup> Following *San Giorgio*, the Commission brought infringement proceedings against Italy: Case 104/86 *Commission v. Italy* [1988] ECR 1799. Similar action was brought against France for like infringements: Case 105/86 *Commission v. France* unreported.

<sup>174</sup> Cass. 16 aprile 1986: *Giust civ.* 1987, I, 630.



Finally, remedies may become ineffective if it ultimately takes too long to obtain them. The sorts of delays inherent in a system where annulment of an administrative measure is sought in one set of courts before an action for compensation for damage resulting from that measure may be brought in another system, militates against the actual effectiveness of any remedy. In *Colussi*<sup>175</sup> it will be recalled that the company first sought the annulment of administrative measures contrary to the EEC Treaty, which was done by the Consiglio di Stato in 1962.<sup>176</sup> The company then sought damages for loss resulting from such measures and accordingly had to start proceedings in the civil courts, which eventually resulted in success before the Corte di Cassazione in 1977.<sup>177</sup>

Following the ECJ decision in *Factortame*,<sup>178</sup> it may be considered that the provision of interim measures in such circumstances in Italy might not prove to be a much more effective remedy considering the time-scale for successful prosecution of litigation. If litigation is to be expedited then it will take legislative intervention to change the basic division of judicial competences between subjective rights and legitimate interests<sup>179</sup> to allow a claim for damages against the administration in the same procedure as seeking annulment of the domestic measure, as in France. Such an enactment would be far-reaching and hardly feasible given the great

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<sup>175</sup> See *supra* at 262 and at 290.

<sup>176</sup> Cons. Stato 7 novembre 1962: *Foro it.* 1963, III, 143.

<sup>177</sup> Cass. 4 agosto 1977: *Giust. civ.* 1978, I, 135.

<sup>178</sup> Case C-213/89, *The Times* 20th June 1990.

<sup>179</sup> See *supra* at 230-231.

weight of doctrinal and jurisprudential authority which would be against such a change.<sup>180</sup>

Generally speaking, however, it would seem that this strict division of competences may have the effect of denying effective protection to individuals seeking to enforce their EC rights.

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<sup>180</sup> See, generally, Zanobini, *Corso di diritto amministrativo* 9th ed., Vol I, at 151ff (1958).

#### (4) HARMONIZATION

The lack of effective protection of rights deriving from directly effective EC law is, at this present time, a serious weakness in the system of legal protection set up by EC law. Throughout the Community, EC rights are guaranteed by means of different national procedures and remedies which afford varying degrees of protection to such rights. There is, therefore, a pressing need to remove the discrepancies between the national systems and to provide remedies according to Community-wide criteria. While consultation of the ECJ through the preliminary ruling procedure may be instrumental in working out common principles for the uniform and effective enforcement of individual rights throughout the whole Community,<sup>181</sup> by the nature of things this can only alleviate but not eliminate the problem.

Since national differences are causing distortion in the conditions of competition and are affecting the functioning of the Common Market, harmonization of the relevant national laws has become imperative.<sup>182</sup>

"Harmonization"<sup>183</sup> represents a form of co-ordination of laws which falls short of full unification but which involves compulsory adoption by each Member State of a nucleus of identical rules which are imposed by Community legislation.

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<sup>181</sup> See Case 60/75 *Russo v. AIMA* [1976] ECR 45 at 62: for a fuller discussion of the case see *supra* at 33.

<sup>182</sup> In accordance with EEC Arts 100-102 and 235. See Case 33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at 1998; Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043 at 2053.

<sup>183</sup> See *Halsbury's Laws of England* 4th ed., Vol 51, paras. 6.07-6.08 at 636-638.

It is thus stronger than mere voluntary adoption of common rules. Where, however, the nucleus of rules is itself all-embracing and detailed, the approximation may in practice amount to unification with no scope left even for minor departures from the uniform norm laid down by the Community act.<sup>184</sup>

The typical Community form of approximation of laws is the directive. By this means, Member States are bound to achieve the results indicated in the directive but have discretion as to the choice of form and methods.<sup>185</sup> That type of act is mandatory if the basis for action is EEC Arts 54, 100 or 101.<sup>186</sup> A different procedure is provided in EEC

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<sup>184</sup> See e.g. the directives laying down manufacturing standards for motor vehicles: EEC Dir 70/156; 70/221; 76/114 etc. A general discussion of such directives is contained in *Halsbury's Laws of England* 4th ed., Vol 51, paras. 6.45-6.60 at 662-674.

<sup>185</sup> EEC Art 189(3).

<sup>186</sup> EEC Art 54: "3. The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation ... the maintenance of which would form an obstacle to freedom of establishment ....

EEC Art 100: "The Council shall ... issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."

EEC Art 100A: "1...The Council shall ... adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

EEC Art 101: "Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult

Art 220, under which Member States are required to negotiate Treaties with each other on a number of procedural matters.<sup>187</sup>

The need for harmonization measures was stressed by the ECJ<sup>188</sup>

Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.

In fact, in a further case,<sup>189</sup> the ECJ went so far as to speak of the "regrettable absence of Community provisions harmonizing procedure and time-limits." The reference to EEC Arts 101-102 as well as EEC Art 225 is quite significant since it suggests that such measures may be taken either by way of directives or regulations, as the case may be.

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the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the Council shall ... issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty."

<sup>187</sup> EEC Art 220: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:  
- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals...."

See also EEC Article 235: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall ... take the appropriate measures."

<sup>188</sup> Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043 at 2053.

<sup>189</sup> Case 130/79 *Express Dairy v. Intervention Board for Agricultural Produce* [1980] ECR 1887 at 1900.

The only development of any significance has been in the field of restitution, where two customs regulations have been adopted.

The EEC Reg 1430/79,<sup>190</sup> adopted under EEC Arts 43 and 235, seeks to regulate uniformly (on the Community level) the reimbursement or remission of Community charges the national authorities imposed in accordance with the various EC regulations. Similarly, EEC Reg 1697/79<sup>191</sup> seeks to ensure, in a uniform manner, a post-clearance recovery of such charges the national authorities failed to collect.

Both regulations relate to "import duties" and "export duties," terms which are defined widely to cover, broadly speaking, agricultural levies and monetary compensation amounts as well as customs duties and charges of equivalent effect. However, the ECJ has held<sup>192</sup> that these regulations only cover "taxes, charges, levies and duties created by various Community provisions and collected by the Member States on behalf of the Community" and not those levied by Member States contrary to EC law.

The period of prescription of three years is established by both regulations<sup>193</sup> for claims of reimbursement of import or export charges which were erroneously calculated. The statement of reasons supporting EEC Reg 1430/79 seem to suggest only a reimbursement of those charges which were either erroneously calculated or which applied an inaccurate

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<sup>190</sup> As amended by EEC Reg 3069/86.

<sup>191</sup> As amended by EEC Reg 918/83.

<sup>192</sup> Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>193</sup> EEC Reg 1430/79, art 2(2); EEC Reg 1697/79, art 2.

or incomplete criteria. These reasons fail to mention explicitly a ruling of the ECJ declaring a regulation invalid or null and void as a possible ground for reimbursement of charges. Being rather broadly drafted, Reg 1430/79 may be expected to be applicable to such a situation as well.

It is submitted that in the area of customs duties, a further regulation or directive could profitably be issued. Such a measure would deal with taxes, charges, levies and duties levied by Member States contrary to EC law and harmonise limitation periods and procedures for claiming reimbursement of such levies. It would put into a legislative form, the rights formulated by the ECJ permitting the recovery of illegally-levied charges by Member States<sup>194</sup> and regularise the conditions which may be imposed e.g. for establishing whether the charge in question had been "passed on" to the consumer. Time limits would follow EEC Regs 1430/79 and 1697/79 by providing a three-year period within which an action may be commenced.

As regards damages, a directive could be issued to harmonise the position with regard to claims for damages for breach of EC law. Perhaps a first step would be to permit recovery of damages for loss caused between the date on which the ECJ rules that a Member State had infringed Community law and the date of that State's compliance with that judgment. For example, in *Bourgoin*<sup>195</sup> the ECJ ruled against the United Kingdom in June 1982 but the offending import ban was not in fact repealed until November of that year; this was too late

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<sup>194</sup> See *supra* at 18-24.

<sup>195</sup> [1986] QB 716.

for the plaintiffs' turkeys to be sold on the British market during the 1982 Christmas season. In the light of this case, it is strongly arguable that the principle of effectiveness requires damages to be recoverable for any delay by the authorities in implementing a judgment of the ECJ. Although this is a partial solution, it would mark an initial step to harmonising the area.

It has been suggested<sup>196</sup> that an effective protection of Community rights necessitates a system of public tort liability embracing all State authorities. Further development could therefore lie with an EC measure stating that damages will be awardable as a consequence of national provisions held by the ECJ, under EEC Art 169, to be inconsistent with the Treaty.<sup>197</sup>

More work on the regularisation of non-contractual liability of the Community itself and a relaxation of the requirements it imposes for compensation to be obtained in case of damage sustained as a result of unlawful EC measures would also be welcome. While the situation continues in which the Community does not incur liability for legislative measures unless the institution concerned has manifestly and gravely disregarded the exercise of its powers, national

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<sup>196</sup> Kovar, 'Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire' in *Les recours des individus devant les instances nationales en cas de violation du droit européen* at 245 (1978).

<sup>197</sup> This would put on a legislative footing the judgment of the ECJ in Case 6/60 *Humblet* [1960] ECR 559 at 569 where it was stated that a Member State which had infringed the Treaty must "make reparation for the unlawful consequences which may have ensued."



courts will not be prepared to demand any similar criteria for non-contractual liability from their own States.<sup>198</sup>

Following the decision of the ECJ in *Factortame*,<sup>199</sup> European legislation may be needed to harmonise the procedures for and award of relief with respect to the period prior to judgment. Interim measures, such as an interim injunction, should be made expressly available to nationals of all Member States, e.g. to protect putative EC rights pending final determination of the case through a preliminary reference to the ECJ or to protect their rights deriving from directly effective EC provisions.

In the absence of any such legislative effort at this present time, the nature and scope of the legal safeguards under national law for the direct and immediate protection of EC rights necessarily varies between Member States owing to differences in domestic procedures and remedies. While this diversity of legal protection renders unattainable the objective of uniformity of Community law, the national courts remain bound to provide effective protection for EC rights. The remedies which may be afforded by the domestic courts include restitution of taxes levied in contravention of EC law; interim measures to protect (putative) EC rights pending final determination; damages for loss resulting from a breach of Community law by public authorities; and judicial review or annulment of the administrative act which amounted to such a breach.

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<sup>198</sup> This was the reasoning of the majority of the Court of Appeal in *Bourgoin* [1986] QB 716: for a full discussion see *supra* at 100-102.

<sup>199</sup> Case C-213/89, *The Times* 20th June 1990.

It has been shown that, in certain circumstances, the level of domestic protection is deemed to be insufficient for the purpose of enforcing Community rights, either because of a rule of domestic law or due to the non-recognition of the directly effective provisions of certain directives. Where the national measure prevents the award an effective remedy, domestic courts are required to disapply such measure and afford the necessary safeguard. As the situation stands at the moment, although a wide range of remedies are available in the English, French and Italian courts against the administration for breach of EC law, no one system possesses sufficient remedies to guarantee the full and effective protection of Community rights.

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